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THE LAW REPORTS

[1917] Appeal Cases

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1917.

THE
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
AND
PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

REPORTERS.

House of Lords	H. B. HEMMING,	<i>Barrister-at-Law.</i>
Privy Council	A. M. TALBOT,	<i>Barrister-at-Law.</i>

1917.

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JUDGES AND LAW OFFICERS.

MEMORANDA.

1916.

Dec. 29. GORDON HEWART, ESQ., K.C., *Solicitor-General*, received the honour of *Knighthood*. THE RIGHT HONOURABLE SIR SAMUEL EVANS was made a G.C.B.

1917.

Jan. 18. SIR MAURICE HILL, K.C., was appointed one of the *Justices of the High Court of Justice*.

Oct. 12. ALEXANDER ADAIR ROCHE, ESQ., K.C., and ARTHUR CLAVELL SALTER, ESQ., K.C., were appointed *Justices of the High Court of Justice* and were afterwards *Knighted*.

Nov. 16. SIR EDWARD RIDLEY and SIR HENRY BARGRAVE FINNELLEY DEANE were sworn of the *Privy Council* and took their seats at the Board accordingly.

LIST
OF THE
JUDICIAL COMMITTEE
OF
HIS MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL,
ESTABLISHED BY THE 3RD & 4TH WILL. IV., c. 41,
FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY
IN COUNCIL.

1917.

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Earl of *Halsbury*.
Earl *Loreburn*.
Viscount *Haldane*.
Lord *Buckmaster*.
Lord *Dunedin*.
Lord *Atkinson*.
Lord *Shaw*.
Lord *Moulton*.
Lord *Parker of Waddington*.
Lord *Sumner*.
Lord *Parmoor*.

Lord *Wrenbury*.
Lord *Strathclyde*.
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Sir *Samuel Evans*, G.C.B.
Syed *Ameer Ali*, C.I.E.
Sir *Walter Phillimore*, Bart.
Sir *Arthur Channell*.
Sir *James Rose-Innes*, K.C.M.G.
Sir *Lawrence Jenkins*, K.C.I.E.

And those other members of the Privy Council who are within the provisions of the statutes 3 & 4 Will. 4, c. 41, 44 Vict. c. 3, and 50 & 51 Vict. c. 70.

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

GREENWOOD APPELLANT ;	H. L. (E.) * 1916 <u>Nov. 3.</u>
AND	
JOSEPH NALL AND COMPANY, LIMITED .	RESPONDENTS.

Workmen's Compensation—Basis of Calculation—Death—"Employment by same employer"—Interruptions by Absence from Work due to Illness—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., pars. 1 (a) (i.), 2 (c).

Employment by the same employer, as defined by par. 2 (c) of the First Schedule to the Workmen's Compensation Act, 1906, means employment in the same grade, which is not interrupted by absence from work due to illness or any other unavoidable cause.

Dictum of Cozens-Hardy M.R. in *Perry v. Wright* [1908] 1 K. B. 441 (at p. 453), that in determining the meaning of "employment

* *Present* : EARL LOREBURN, LORD KINNEAR, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

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by the same employer " interruptions due to illness or any other unavoidable cause are to be disregarded, overruled. (1)

Dictum of Fletcher Moulton L.J. (at p. 460) approved.

A workman who died from an injury by accident arising out of and in the course of his employment entered into the employment of a firm as a carter more than three years before the injury, but during those three years he was absent from work from time to time for an aggregate period of six months. His absence for the greater part of the period was due to illness or to accidental injury :—

Held, upon the construction of par. 1 (a) (i.) and par. 2 (c) of the First Schedule, that he was not in the employment of the same employer during the three years next preceding the injury from which he died, and, therefore, that the compensation payable to his dependants was to be calculated, not upon the basis of his actual earnings during the three years, but upon the basis of his average weekly earnings during the period of his actual employment *since the last unavoidable interruption*.

Decision of the Court of Appeal [1915] 3 K. B. 97 reversed.

APPEAL from a decision of the Court of Appeal (2) affirming an award of the county court judge of Lancashire under the Workmen's Compensation Act, 1906.

The appellant claimed compensation for the death of her husband, William Greenwood, a carter in the employment of the respondents, who on September 7, 1914, was injured by an accident arising out of and in the course of his employment, and who died on September 12, 1914, as the result of his injuries. The appellant was wholly dependent on the earnings of her husband. The sole question at issue was as to the measure of compensation.

Greenwood entered the respondents' employment as a carter more than three years prior to the date of his injury, but during the said three years he had been absent from his work for an aggregate period of 163 days. On 35 days his absence was due to illness and on 83 days to injury from accident within the meaning of the Act. His absence during the remaining 45 days was unaccounted for.

The appellant claimed compensation on the basis of the average weekly earnings of the deceased during the period of his actual employment under the respondents. This amounted to a sum of 212*l.* 11*s.* The respondents contended that the amount of compensation payable was a sum equal to the earnings of the deceased in

(1) Erroneously stated in the Court.
head-note as the opinion of the (2) [1915] 3 K. B. 97.

the employment of the respondents during the three years preceding the injury less the amounts of weekly payments made under the Act. This sum amounted to 159*l.* 15*s.* 3*d.* The question turned upon the construction of par. 1 (a) (i.) and par. 2 (c) of the First Schedule to the Act. (1)

The county court judge, on the authority of *Perry v. Wright* (2), and without expressing any independent opinion of his own, upheld the contention of the respondents and awarded compensation on the basis of the actual earnings of the deceased during the three years next preceding the injury, and his award was affirmed by the Court of Appeal (Lord Cozens-Hardy M.R., Pickford L.J., and Warrington L.J.).

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1916. Nov. 2, 3. *Sir John Simon, K.C.*, and *T. B. Leigh* (with them *Horace Fenton*), for the appellant. Upon the construction of par. 1 (a) (i.) and par. 2 (c) of the First Schedule to the Workmen's

(1) Workmen's Compensation Act, 1906, First Schedule:—

Par. 1. "The amount of compensation under this Act shall be—

"(a) where death results from the injury—

"(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said

employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer; "

Par. 2. "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:—

"(c) employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause; "

(2) [1908] 1 K. B. 441.

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Compensation Act, 1906, a workman who has entered into the employment of a firm more than three years before the injury which kills him, but whose employment during those three years has been interrupted from time to time by illness or other unavoidable cause, has not been in the employment of the same employer during the three years, but has been in that employment for a less period, and therefore the compensation to be awarded to his dependants is to be computed not upon the basis of his actual earnings during the three years, but upon the basis of his average weekly earnings from the time of the last unavoidable interruption. Reading par. 2 (c) into par. 1 (a) (i.), there is here no employment by the same employer during the three years next preceding the injury, because it is not employment uninterrupted by illness or other unavoidable cause. Par. 2 (c) was a new provision inserted in the First Schedule to the Act of 1906 in order to remove certain difficulties which had arisen upon the construction of par. 1 of the First Schedule to the Act of 1897 ; but even under the earlier Act it was decided that there must have been a substantially continuous employment : *Jones v. Ocean Coal Co.* (1) ; *Gibb v. Dunlop & Co.* (2) The Court of Appeal have ignored altogether absences from illness or other unavoidable cause and have based themselves upon *Perry v. Wright*. (3) This particular point, however, was not raised by any of the group of cases reported under that title, but there are certain observations of the learned judges upon the subject. The paragraph of the head-note which deals with this point is not a fair summary of the opinion of the Court of Appeal. It is taken from the judgment of Cozens-Hardy M.R., but Fletcher Moulton L.J. put a different construction upon par. 2 (c), and Farwell L.J. gave no independent judgment. The opinion of the Master of the Rolls is not warranted by the language of par. 2 (c), and the opinion of Fletcher Moulton L.J. is correct. The meaning is that any interruption arising from sickness or other unavoidable cause prevents the employment from being the same employment.

Rigby Swift, K.C., and *T. Eastham*, for the respondents. Mere absence from employment from sickness does not necessarily terminate the employment. Par. 2 (c) has no application at all to

(1) [1899] 2 Q. B. 124.

(2) (1902) 4 F. 971.

(3) [1908] 1 K. B. 441.

par. 1 (a) (i.), but relates only to a case where compensation has to be ascertained by a calculation on averages. [They referred to *Carter v. John Lang & Sons*. (1)] The schedule does not say that the employment must have been continuous during the whole three years, but says that the compensation is to be a sum equal to the man's earnings in the employment of the same employer during the three years. The Legislature has assumed that the man may be in the same employment although he may not be earning wages for a part of the time. If there were a continuous cessation from work, say, for eighteen months, the county court judge would be justified in finding that the employment was broken. But suppose the man worked four days only in each week, there would be no break. Putting aside par. 2 (c), was there here as a fact continuous employment? There is no evidence of any contract of employment other than that arising from the weekly payment of wages, which, it is submitted, would entitle the man to a week's notice. The question whether these temporary stops amount to a break in the employment so that when the man starts work again he begins a new employment is a question of fact for the county court judge. The workman himself would say he was always in the same employment; he was not in any other employment. Notwithstanding the breaks the employment here has not been for less than a period of three years. When the man goes back to work there is no fresh contract of service; he goes back on the old terms and he continues in his old employment, and therefore his actual earnings are to be taken as the basis of compensation. If it be said that this arrangement is inequitable, it must be remembered that the Act establishes a minimum compensation as well as a maximum, and between those two limits individuality is to count. The intention of the Legislature was that in the case of a three years' employment the calculation was to be based on actual experience, which is the best test, and that it was only in the case of a shorter period that recourse was to be had to averages. As to par. 2 (c), the meaning is that the employment is not to be treated as being interrupted by absence from illness or other unavoidable cause; in other words, that absence from those causes is not to count. In *Anslow v. Cannock Chase Colliery Co.* (2), although there were several breaks in the employment, both the Court of Appeal

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(1) (1908) 45 S. L. R. 938. (2) [1909] 1 K. B. 352; [1909] A. C. 435.

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and the House of Lords treated the employment as continuous, but the point does not appear to have been raised. That was a case of a twelve months' employment, but upon the question of continuous employment the same considerations apply. On the appellant's contention par. 1 (a) (i.) would be practically inoperative, because it would very rarely happen that an employee was never absent from illness during the period of three years. The county court judge must be assumed to have found that the relation of master and servant had not been in fact terminated during the three years, and there was evidence to support that finding.

[LORD PARMOOR. The county court judge expressly bases his judgment on law.]

Sir John Simon, K.C., in reply. It is not open to the respondents to contend that par. 2 (c) does not apply to par. 1 (a) (i.). Par. 2 begins by saying "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman the following rules shall apply." Under the old Act it was decided that a change of grade did not import a change of employment: *Price v. J. Marsden & Sons* (1); and it cannot be doubted that par. 2 (c) intended to alter that. No argument can be founded upon *Anslow v. Cannock Chase Colliery Co.* (2) because the point was not present to the mind of the House.

EARL LOREBURN. My Lords, the question in this case is whether a man who has been working for three years less 163 days for the same employer is to be compensated on the footing of the aggregate earnings for three years under Sched. I., par. 1 (a) (i.). I think not, but that he ought to be compensated upon the alternative method provided by par. 1 (a) (i.). The object of that first limb of par. 1 (a) was to take the case of a man who has been in regular employment for three years continuously with the same employer, and so to avoid any further calculation in arriving at the compensation that is to be paid to him; the object seems to be to take a short cut to award compensation automatically. There are many persons who would come within this standard; it is a sure standard, and if the standard does not apply, then you go to the end of the same subsection and you apply the method which is there described. I look

(1) [1899] 1 Q. B. 493,

(2) [1909] A. C. 435.

at the language of this particular sub-section ; the language is “employment of the same employer during the three years next preceding the injury.” Has a man been employed during the three years if he has for 163 working days not been employed at all ? I think that question answers itself. He has not.

My Lords, there is another sub-section in this schedule to which reference has been made ; that is par. 2 (c). I will not say anything which is unnecessary about the wording of this clause, but it is a difficult clause ; whatever else it does, it certainly supplies a definition of the phrase “employment by the same employer.” I have been conferring with your Lordships in regard to that definition, and I think we have all agreed to this : Leaving out any reference to grade, which is quite a different matter, this definition says that employment by the same employer means employment “uninterrupted by absence from work due to illness or any other unavoidable cause.” It follows, therefore, that if the employment is so interrupted, then it is not employment by the same employer for the purpose in hand. I apply that definition to par. 1 (a) (i.) and I ask myself whether it can be affirmed in regard to this case that this employment was uninterrupted in the terms of that definition. It is an agreed fact that this employment was interrupted ; if it were necessary that would be quite sufficient to show that in this case the contention of the appellant is accurate. In my opinion it is unnecessary to have recourse to that sub-section, because the words of the earlier sub-section itself lead to the same result. I look at the words of the Act itself, and I think that they sustain the contention of the appellant.

LORD KINNEAR. My Lords, I agree entirely with the noble and learned Earl on the woolsack, and I have very little to add ; indeed, I do not think I have anything to add beyond repeating what he has already said. But it appears to me that the question is one of mere interpretation of very plain language ; we have got to ascertain what the Legislature says.

In the first place we have to read the first section of the First Schedule ; taking that apart altogether from the definition clause in the second section, I should be disposed to hold that the case provided for under par. 1 (a) (i.) is that of a workman who has been

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employed continuously by the same employer during the three years next preceding the injury. The words "during a certain period" import duration; the period of duration is fixed, and if it is required that the employment shall have been during a certain fixed period, I do not think that condition is satisfied by an employment which has lasted for a shorter period. I cannot read the words as describing the case of a person who from time to time in the course of three years has been employed; it is the case of a person who has been continuously employed throughout the whole period. I must, however, admit that, whatever my own view may be, there is a great deal to be said in support of a contrary view of that particular section; but then when we come on to par. 2 (c) it appears to me that any obscurity which may have been left in par. 1 (a) (i.) is completely cleared up. The statute says in plain words that "for the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman" certain rules shall be observed. Now that proviso which we have to construe is a provision relating to earnings, and upon one alternative to weekly earnings also. Then the section goes on to define the words that are used not only in the particular sub-section that we have been considering, but throughout the series of sub-sections dealing with the computation of compensation with reference to a workman's earnings, and it says that where in these clauses you find the words "employment by the same employer" those words shall be taken to mean "employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause." I do not think we need to consider the precise meaning and effect of the new condition with reference to the grade of employment, although the words are plain enough. But, assuming that this condition may be passed over in the meantime, as creating no difficulty, the statute says that wherever in the clauses to which it refers you find the mere words "employment by the same employer" you must take them to mean employment uninterrupted by absence from work due to illness or any other unavoidable cause. I cannot for myself see any room for doubt as to the meaning of these words; I say so with the greatest respect for the learned judges of the Court of Appeal, and indeed I must say that my own difficulty throughout this case has been that,

when I find words which appear to me to be perfectly clear and discover that they are construed otherwise by judges of so great eminence, I cannot rid myself of the apprehension that the apparent clearness to my mind may probably be due to my having overlooked some material consideration to which they have given its due weight. But then I cannot find in the reasons explained in the Court below anything to displace my own conclusion, and must therefore fall back upon the actual words of the Act of Parliament and read them for myself as best I can. As a mere matter of grammatical reading there can be, I suppose, no question at all that the words "uninterrupted by absence" relate to one possible antecedent and only one, namely, employment—employment during three years uninterrupted by absence from work. I think that means only one thing. It is impossible to argue about it, or to make it plainer. The peremptory condition of par. 1(a) (i.) therefore as defined by par. 2 (c) is that the man shall have been employed during an uninterrupted period of three years, and when you find that in fact his employment has been interrupted by absence for 163 days, I think that is not an employment which satisfies the condition of the statute. I cannot accept the construction that the words "uninterrupted by absence" mean that if such interruption occurs it is to be entirely disregarded.

I should only add with regard to the case of *Perry v. Wright* (1), which has been founded upon by the respondents, and founded upon very strongly in the Court of Appeal, that I assent to the reading of the statute which is to be found in the judgment of Fletcher Moulton L.J. I do not understand that the authority of that case is disputed so far as regards the points actually decided, and as to which the learned judges were agreed. But the question as to the effect of par. 2 (c) with which we are concerned was not decided. It was really a side issue, and the judges differed about it. As I understand Fletcher Moulton L.J., his view seems to be that in the case provided for by par. 1 (a) (i.), where a workman has been in the same employment for an uninterrupted period of three years, the compensation is to be based on the total earnings for that period, but if that employment has been interrupted the compensation is to be based on a computation of average weekly earnings. The distinction is that in the first case you have nothing to do with weekly averages,

(1) [1908] 1 K. B. 441, 460.

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but must take the facts as they stand, and in the second you cannot proceed upon actual earnings because the earnings have been interrupted during the three years by illness or other inevitable cause, and you must therefore follow the other method and compute the average of the weekly earnings. But that result arises in the case of an interrupted employment, just because in that case par. 2 (c) excludes the period during which the man may have worked prior to interruption from the scope of par. 1 (a) (i.).

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the judgments which your Lordships have just delivered. I will put my own view in very few words, referring particularly to the case of *Perry v. Wright* (1), to which I shall presently allude.

Three years prior to the accident to this unfortunate workman he entered the employment of the respondents. In the course of those three years he was for periods amounting to six months earning no wages and giving no service by reason of injury and illness, and for the remainder of the period he was in the respondents' service. I am of opinion that these facts do not bring the case within the first portion of par. 1 (a) (i.) of the First Schedule, seeing that the workman was not employed for what in my opinion is necessary, namely, a continuous period of three years.

My Lords, there have been many difficulties raised as to what continuous employment is, and I am not surprised that par. 2 (c) was in the latest Act of Parliament inserted for the purpose if possible of clearing certain difficulties out of the way. The construction and effect of that sub-section has been treated by the learned judges of the Court of Appeal in the present case as practically concluded by the case of *Perry v. Wright*. (1) I myself would not have read the case of *Perry v. Wright* (1) as a decision upon this point. Since, however, it has been referred to, I desire, following my noble friend who has just preceded me, to attach my adhesion to those words from the decision therein by the learned Lord Moulton, who says: "We have not here to consider a case in which those earnings have been interrupted during the three years by 'absence from work due to illness or any inevitable cause'"; and then he gives the reason applicable to such situation: "because according

(1) [1908] 1 K. B. 441.

to s. 2 (c) that would prevent the earlier period counting, and would thus exclude the case from the special provisions in question." My Lords, I assent to that; it is entirely my own view, as I understand it to be the view of your Lordships.

With much respect to the learned judges of the Court of Appeal in the present case, I do not feel able to assent to their view that par. 2 (c) must be construed in the sense that a Court of law is bound to disregard the fact and period of interruption. That does not seem to me to be what the section provides. And I would add this, that the Court of Appeal itself does not disregard the fact and period of the interruption, because the fact and period of interruption are reckoned *in* for the purpose of summing up the gross period of employment, and they are of course reckoned *out* for the purpose of the calculation of wages. In short, my Lords, the result of this peculiar process of disregarding the interruption is that the Court has assumed that the weeks of interruption were weeks of employment, but of employment at no wages at all. My Lords, I do not think that that was what was meant by the statute, nor do I think that that is the result of the provision.

It humbly appears to me that par. 2 (c) can be read, and read perfectly simply, along with the cardinal provision in par. 1 (a) (i.). An interrogative may furnish a comprehensive and crucial test to apply to such a case. The question to be put is: Has the workman been employed by the same employer in the same grade during the period of three years: which employment has not been interrupted by absence owing to sickness or other unavoidable cause? If these things, (1.) employment by the same employer, (2.) in the same grade, and (3.) uninterruptedly for three years, can each and all be affirmed, then par. 1 (a) (i.) (1) applies; not so, if they cannot be so answered.

LORD PARMOOR. My Lords, there are two methods by which the amount of compensation may be calculated in the First Schedule of the Workmen's Compensation Act, 1906, par. 1 (a) (i.). In the first of these cases, which implies mere arithmetic, the sum is "a sum equal to his earnings in the employment by the same employer during the three years next preceding the injury." I agree, my Lords, that

(1) I.e. the first limb of that paragraph.

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that necessarily implies continuity of employment, but it appears to me that if that phrase had stood alone without the subsequent definition which we find in par. 2 (c) various difficulties and nice questions of law might have been raised. It is important, particularly in an Act like the Workmen's Compensation Act, 1906, to get all the clearness possible in order to avoid unnecessary litigation. The second alternative we are not concerned with; the amount in that case is 156 times the average weekly earnings of the workman.

Now, my Lords, the first point which has been discussed is whether par. 2 (c) applies. It was pointed out that in the head-note in the *Law Reports* the Court of Appeal were said to have found that par. 2 (c) did not apply to par. 1 (a) (i.). I do not read the decision of the Court of Appeal in that sense. It appears to me that it is impossible to say that par. 2 (c) has no application when we look at the words with which that sub-section commences: "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:" Now par. 1 (a) (i.) refers both to earnings and to average weekly earnings, and I do not think under those circumstances it is possible to suggest that par. 2 (c) is not applicable.

My Lords, as regards the construction of par. 2 (c) I desire to express my entire agreement with what was said by the noble Earl on the woolsack, and I do not desire to add any words of my own. I must say that I am unable to understand, speaking with all respect of the very learned judges of the Court of Appeal, how they came to the conclusion which perhaps is expressed most clearly in the words of Warrington L.J., who after quoting par. 2 (c) says this (1): "I think it means this, that you are to regard the period of his employment in the one grade, and for that purpose interruptions by absence from work due to illness or any other unavoidable cause are to be disregarded." I should have thought that on the clear words of par. 2 (c) absence from work due to illness or any other unavoidable cause was not to be disregarded, but that you had to consider whether interruptions had arisen from either of those causes in considering the continuity of employment by the same employer.

My Lords, it seems to me that the matter is not one of much difficulty, because if you read the definition in par. 2 (c) into

par. 1 (a) (i.) it reads thus : “ a sum equal to his earnings in the employment of the same employer where there has not been interruption by absence from work due to illness or other unavoidable cause.” It is clear that there was such interruption in this case, and therefore that portion of the schedule is not applicable.

My Lords, in my opinion the appeal succeeds.

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Order of the Court of Appeal reversed and judgment entered for the appellant for the sum of 212l. 11s. : the respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords’ Journals, November 3, 1916.

Solicitors for appellant : *Shaen, Roscoe, Massey & Co., for T. A. Needham, Manchester.*

Solicitors for respondents : *Nicholson, Graham & Jones, for Wood & Lord, Manchester.*

[HOUSE OF LORDS.]

HAMPTON APPELLANT ;

AND

GLAMORGAN COUNTY COUNCIL RESPONDENTS.

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Building Contract—Construction—Provisional Item—Employment of Specialist by Building Contractor—Liability of Building Owner to Specialist.

A builder contracted with a county council to build a school in accordance with the specifications and directions of the council’s architect for a lump sum of 13,600l. The specification contained certain provisional items, including the following :—“ Provide the sum of 450l. for a low pressure heating apparatus.” A hot water engineer submitted a scheme to the architect for the heating of the school for 391l., and by the direction of the architect this scheme was accepted by the builder. During the progress of the work the builder paid to the engineer 200l. on account, but he was unable to pay the balance. In an action by the engineer against the council as building owners for payment of the balance of his account :—

Held, upon the construction of the building contract, that the builder was to erect the school for a lump sum, including, if

* *Present* : EARL LOREBURN, VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

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required, the heating apparatus up to a cost of 450*l.*, and that the builder, in employing a specialist to put up the heating apparatus, was acting as a principal and not as the agent of the building owners; and that the action failed.

Crittall Manufacturing Co. v. London County Council (1910)
75 J. P. 203 observed upon by Lord Shaw of Dunfermline.
Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal reversing a judgment of Horridge J.

The appellant, who, under the style of Hampton and Company, carried on the business of a hot water heating engineer at Cardiff, brought an action against the respondents for payment of the sum of 197*l.* 17*s.* for goods sold and delivered to, and for work and labour done for, the respondents.

By a building contract dated February 16, 1911, and made between Stephen Shail, a builder, and the respondents, who were the education authority for Glamorganshire, Shail, in consideration of a lump sum of 13,600*l.*, undertook to execute and complete in accordance with the specifications and directions of the respondents' architect "the several works required for the purpose of erecting a new intermediate school for girls and caretaker's house at Pontypridd," which said works were stated to be more particularly described in the specification.

The contract provided that the contractor should follow the directions of the architect and that no part of the works should be underlet without the previous consent in writing of the architect, and the architect was to be at liberty to order the omission of any part of the works. The consideration money was to be paid, upon certificates to be from time to time given by the architect, in instalments at the rate of 90 per cent. on the value of the work certified to have been done and of the goods certified to have been delivered on the site for the purpose of the works.

The respondents appointed the firm of A. O. Evans Williams and Evans to be the architects for the school.

The specification and bill of quantities comprised certain provisional items, including the following:—

"Provide the sum of four hundred and fifty pounds for a low pressure heating apparatus."

"Form or cut all holes for pipes in walls and floors and make

good. Make all preparation for pipes, brackets, and fittings, and attend on engineers' men and include for the provision of a strong plain bench for the use of the engineers."

On March 24, 1911, the architects invited the appellant to prepare a scheme and tender for the work of providing the heating and hot water apparatus for the school, and on April 29, 1911, they wrote again to the appellant enclosing the plans of the school, on which they had marked the points to which they wanted the hot water conveyed, and stating that they left the system of the heating apparatus to the appellant. After some further correspondence the appellant on June 19, 1911, offered to do the work for 391*l*. On June 21 the architects directed Shail to accept the appellant's tender, and on June 26 Shail wrote to the appellant "I am directed by the architects to state that your scheme for the heating of these schools at 391*l*. has been approved of by them," and he asked for details. He also asked for a commission of 5 per cent., but this was refused. The appellant thereupon proceeded with the work. On July 25, 1912, the appellant applied to the architects for a certificate for 200*l*. on account. The architects replied that they only issued certificates to the general contractor and suggested that he should apply for payment to Shail. The appellant accordingly applied to Shail, and on July 31 received from him 200*l*. on account. On November 18, 1912, the appellant applied to the architects for a certificate for a further sum of 120*l*., and on November 19 the architects replied, "With regard to your application for a certificate, it is needless of course to point out that we do not certify for special sums for special contractor's work but include for the value of such work from time to time in the builder's certificates." On November 20 the appellant applied for payment to Shail, but on the same day Shail suspended payment and called a meeting of his creditors. The appellant received no further payment from Shail's estate. The appellant then claimed that the respondents were liable to him, which the respondents denied. The appellant nevertheless completed his contract and also did extra work to the amount of 6*l*. 17*s*., which it was agreed stood on the same footing as regards the respondents' liability as the balance of 191*l*. remaining unpaid on the appellant's contract.

On October 16, 1913, the appellant issued the writ in this action.

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By his statement of claim the appellant alleged that the work was done and the goods were supplied under an agreement between the appellant and the respondents, which was pleaded alternatively as having been made by the architects or Shail acting on behalf of the respondents. The respondents by their defence denied that either the architects or Shail had any authority to make any contract on the respondents' behalf and alleged that the heating apparatus was supplied by the appellant to Shail on Shail's own behalf.

Horridge J., on the authority of *Crittall Manufacturing Co. v. London County Council* (1), held that Shail was acting in regard to the contract for the heating apparatus as the agent of the respondents and gave judgment for the appellant for the amount claimed. The Court of Appeal (Buckley L.J., Pickford L.J., and Bankes L.J.) held that the only contract was with Shail as principal and directed judgment to be entered for the defendants (the respondents) with costs.

Buckley L.J. said: "In the case of *Crittall Manufacturing Co. v. London County Council* (1), which has been much relied on in this case, I find Channell J. saying this, which contains a proposition the first part of which I do agree with, but with what follows I do not. He says: 'As I pointed out to one of the learned counsel who so ably argued this case before me, the fact that a man gets property by buying it from his contractors does not necessarily make him liable to pay the person from whom the contractor bought it. The mere fact that he is to have the property ultimately does not make the contract to buy that property his contract, or make him the principal.' With that I entirely agree. Then the learned judge goes on, 'In the case of these provisional items, however, it does seem that the contract made to procure them is in point of fact a contract in which the building owner is the real principal; because if it is a good contract he gets the benefit of it; if it is a bad contract he suffers the loss. He is the person who is interested. The builder is not in the least interested. He gets no more if it is a good contract, and no less if it is a bad one. He simply has his accounts settled. He brings into the account the actual instead of the provisional sum. In my view the effect of this clause as to provisional items, which is very common in contracts, is generally to make the building owner a real principal upon the contract under

which these things are ultimately supplied.' Now, if I understand that language as laying down in point of law that the fact that an item is what is generally called a prime cost item, and a sum is provisionally allowed for it in a building contract, is such as to show *prima facie* the building owner is responsible for it, I do not agree with it. The learned judge, in the words that I read first, had negatived the proposition that you are necessarily liable to pay because you get the benefit of it. That principle is not a correct one. And I do not think there is any difference of principle as between a prime cost item and any other item in respect of which one person is to find and supply goods for the benefit of another, which makes it any more or any less likely that there is a contract between the person who supplies the goods and the person who ultimately enjoys the benefit of the goods. I notice that *Crittall Manufacturing Co. v. London County Council* (1) was followed by Coleridge J. in *Young & Co. v. White*. (2) I think that learned judge carried the principle of *Crittall Manufacturing Co. v. London County Council* (1) even further than Channell J., and I confess that I do not think that the judgment of Coleridge J. can be supported. The dominant sentence in his judgment is this, that he—that is, the builder—contracts as agent where specialists are concerned. I do not agree that there is any such principle. I think we have to ascertain from the contractual relations of the parties whether the contract was or was not made between the building owner and the person who supplies the goods."

Pickford L.J. said that if the cases before Channell J. and Coleridge J. went to the extent to which they were pressed by the plaintiff's counsel he would not agree with them. He did not think it would be correct to say that whenever there was a prime cost or provisional item, in the absence of any indication to the contrary, the building owner was responsible, and he had some doubt whether Channell J. meant to say anything so strong as that. Bankes L.J. said that it seemed to him perfectly clear on the correspondence that the builder himself entered into the contract with the sub-contractor, and if it was suggested that *Crittall Manufacturing Co. v. London County Council* (1) was an authority that, notwithstanding that fact, the builder must be assumed to have acted as agent for an undisclosed principal, he did not agree with it.

(1) 75 J. P. 203.

(2) (1911) 28 Times L. R. 87.

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1916. Nov. 7, 9. *R. F. Colam, K.C.*, and *Robert Fortune*, for the appellant. By the terms of the building contract the builder is not to supply the heating apparatus ; he is only to provide the money for it, and he cannot spend that money without orders. Upon the builder doing the works specified in the specification and providing the 450*l.* he is to be entitled to the 13,600*l.* As regards the appellant's contract, all the negotiations were carried on with the architects without the appellant even knowing who the builder was, and the builder in accepting the appellant's estimate was acting at the dictation of the architects and without any benefit to himself whether the contract was good or bad ; he was acting for the benefit and on behalf of the respondents. The fact that the builder has bound himself to a contract of which he knew nothing is inconsistent with the view that he was acting as principal. The appellant relies on the general principle stated by Channell J. in *Crittall Manufacturing Co. v. London County Council* (1) in regard to clauses in building contracts dealing with provisional items, namely, that, as a general rule, the proper inference is that the building owner is the real principal upon the contract under which such items are supplied. Buckley L.J. has expressed his dissent from *Crittall Manufacturing Co. v. London County Council* (1) and *H. Young & Co. v. White* (2), which followed it, but his judgment confuses prime cost items and provisional items, and in *Hobbs v. Turner* (3), which is analogous to the present case, the Court of Appeal proceeded on the same principle.

Adair Roche, K.C., and *Horace Rowlands* (for *St. John Field*, serving with His Majesty's Forces), for the respondents, were not called upon.

EARL LOREBURN. My Lords, in this case I think the order appealed from ought to be affirmed, and at the outset I will say a word about the decisions to which reference has been made in the very able arguments which have been addressed to us.

The facts of one case are hardly ever of any value when considering the facts of another case, and the same thing may be said in regard to the construction of one contract, which is rarely assisted by

(1) 75 J. P. 203.

(2) 28 Times L. R. 87.

(3) (1902) 18 Times L. R. 235.

reference to the construction of other and different words. When the case goes upon the construction of a contract or upon a decision of fact, the main—I may say, broadly speaking, the whole—value of a previous decision consists in looking at the point of view from which the learned judge looks at the language, or looks at the evidence.

Now the question in this case is whether the Glamorgan County Council were debtors to the plaintiff. I concede that it is hard upon the plaintiff to have supplied these items and not to have been paid for them, but the county council have paid, or will have to pay, the creditors of Shail. It is always a misfortune when bankruptcy supervenes, but can the plaintiff say that the county council owes this money to him? I think not. Certain work had to be done which is described and comprised in the specification. An entire sum was named for the whole, namely, 13,600*l.*, but a part of the work stood upon a separate footing; that is to say, the heating apparatus, up to the sum of 450*l.*, part of the 13,600*l.*, was provisional. There is no special theory of law as to what is meant by a contract. You have to look at the contract and see what it means itself, and in this contract I think it meant that the county council might prefer to do the work itself, or it might put in a cheaper apparatus than what would cost 450*l.*, or it might require Shail to do it up to the 450*l.* cost, and he agreed to do it, if required, in which case he of course might employ some one else, just as he might employ any tradesman, for the purpose of providing the thing required; and the 450*l.* would be paid as a part of the whole 13,600*l.*, or not paid, or short paid, accordingly, by the county council to Shail.

Now Shail was required to do it, and he employed the plaintiff for this heating apparatus, and made a contract with him; he had to obey the architect, according to the contract, but the architect had no authority to pledge the county council's credit, and there is no evidence that he had any authority of that kind. Had Shail that authority, as is argued, as to this 450*l.* item? My Lords, there is no evidence of it, unless the terms of the contract which deal with provisions confer that authority. They do not do so in terms. Do those words do so by implication? It is said that they merely required Shail to advance the sum of 450*l.* to the Glamorgan County Council if that was needed. If that be the true construction, I do not see why Shail was to be paid for doing that work at all, because

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he was merely a lender of money in connection with that work, and yet the contract says that he is to do the work, and he undertakes to do it. He contracted also that he was to be paid for it as part of the whole 13,600*l.* provided that he was required to do it, and that he did do it, or got it done. That also is not consistent with his duty being only the duty of advancing money. It is consistent only with the view, which I think is the true view, that he was the contractor as to this heating apparatus, and employed a sub-contractor. Accordingly I think he was not an agent of the county council to employ the plaintiff, but he was the principal himself, and the plaintiff was the other principal to this sub-contract. And, my Lords, I find that he so treated himself, both in his books and in his letters, and in receiving part payment of this money from Shail. While I cannot help being sorry for men who have done honest work and not been paid for it, I am afraid he must suffer instead of the other creditors of the unhappy bankrupt in this case.

VISCOUNT HALDANE. My Lords, I agree. As soon as I had satisfied myself that I knew the facts of this case I thought the appeal a hopeless one, and I have continued to think so. In all these cases it is of little use to cite as precedents other contracts which have been construed by other tribunals. There is only one safe way when you are construing a document like this, and that is to take the principle which must govern all similar cases, to bear it firmly in mind, and in the light of that principle to read through the contract. For that reason I think that the passage from Channell J.'s judgment quoted by Horridge J. may have been a right application of the principle to the particular contract he had before him, or may have been a wrong one, but that it is certainly one which throws no light upon the question before us. Nor does the decision in *Hobbs v. Turner* (1), where the contract was very different. In *Hobbs v. Turner* (1), a case in the Court of Appeal, clause 28 of the contract said that the provisional sum was to be expended as the architect should direct and was to be paid by the contractor, and the amount paid by the contractor was to be set against all provisional sums, and any balance he had paid was to be added. On that contract the Court of Appeal held—rightly or wrongly I do

not know ; I have not the argument before me—that, applying the principle, a relation of privity was established between the plaintiffs and the defendants. That was obviously a decision on the terms of a contract very different from the one we have here.

What have we here ? The answer to that question is to be looked for only in the contract. It may well have been possible that if the parties by their correspondence had intended to establish a different relation from that in the contract they could have done so by mutual agreement. But the correspondence is a correspondence which certainly does not tend to show that the appellant and the respondents were ever brought into a relation of privity. If there is anything clear from the correspondence, it is that the appellant was told to look to Shail.

Then, my Lords, turning to the contract itself, the real question that arises—the question that lies in limine of the argument addressed to this House by the learned counsel for the appellant—an obstacle to the threshold of that argument which they have to cross before they can enter the threshold at all—is the answer to the inquiry where privity is to be found in the contract. Certainly not in any clause of the main body of the written document, but, it is said, in the expression in the extract before us from the specification “provide the sum of 450*l.* for a low pressure heating apparatus.”

My Lords, in order to see what that means it is necessary to look at the contract itself. The substance of the contract was that for 13,600*l.* this man Shail, the contractor, was to put up a building complete to the satisfaction of the respondents, and among the things which the building was to include was this heating apparatus which Shail was to get put in to the satisfaction of the architects. The architects had power given them by clause 11 of the contract to direct Shail to omit it if they thought it unnecessary, and in that case the 450*l.* would have been deducted from Shail's lump sum of 13,600*l.*, but if they directed him to provide it, and to provide it in a manner of which they were to be the judges as to whether it was satisfactory or not, then Shail contracted to do that. Shail did put in an apparatus the description of which was approved by the architects, and a tender for which was obtained by the architects ; but the architects obtained that tender for the purpose of communicating it to Shail, and accordingly Shail, in fulfilment of his lump

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sum contract, put it in ; he put it in out of the 450*l.* which was assigned to it in his lump sum.

Now, my Lords, if that is so, *prima facie* the only relation between the appellant and Shail was that of two parties dealing as principals ; there is nothing in that contract which establishes a relation of privity between Hampton (the appellant) and the respondents and there is nothing in the course of dealing which displaces the inference that that is not only the true construction of the contract, but the position in which the parties left themselves. I am therefore of opinion that the appeal fails.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the opinion expressed by the noble Viscount opposite. I should add nothing except that I think it right to call attention to the language used by Channell J. in the case founded upon in the judgment of Horridge J. in the present case and cited textually by the latter. Channell J.'s language would appear, if sound, to have introduced a very serious presumption into the law of contract. "In my view," says the learned judge, "the effect of this clause as to provisional items, which is very common in contracts, is generally to make the building owner a real principal upon the contract under which these things are ultimately supplied." My Lords, with much respect I cannot assent to the view that that is any part of the contract law of these islands, nor can I assent to the view that there is any presumption under the law of contract to that effect. In a question of the determination of privity of contract, my Lords, what has to be done is of course to look at the terms of the specific contract and to construe them. I do not see my way to hold that the determination is affected or governed by any presumption such as that referred to.

My Lords, I assent to the view expressed from the woolsack with reference to the citation of decisions of Courts of law upon contracts which are in their specific terms different from the one under construction and argument. An excellent illustration of the fallacy of that procedure is supplied by the citation of *Hobbs v. Turner* (1) in the present case. An examination of that decision discloses that clause 28 of the contract in *Hobbs v. Turner* (1) has

(1) 18 Times L. R. 235.

no analogue whatsoever in any clause of the contract now before your Lordships.

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Coming therefore to the specific contract before us, I am free to admit that the argument presented to us was up to a certain point right. I refer to the earlier portion of the correspondence by the architects. I am willing to assume for the purpose of the argument presented that the architect in such circumstances is acting as agent for the building owner. My Lords, as is fairly well known, the position of the architect is this, that he is charged with the duty of articulately settling what are to be the items supplied under these "specialist" contracts, and making certain selections, and even, in certain contracts, of nominating certain merchants. In the present case, however, the facts do not stop with that initial correspondence. When the stage of actual contract was being reached, the architect was approached on the subject by Messrs. Hampton, and he then made his position perfectly clear. It was this: "You must deal with the contractor." Accordingly Messrs. Hampton did deal with him, and they obtained, not in express terms, but by what in admission is by its implications equivalent thereto, the acceptance by Mr. Shail, the builder, of their (Messrs. Hampton's) contract.

My Lords, there is a further stage in the proceedings which think is not without interest. When one half, or thereby, of the contract price was due, a certificate was applied for to the architects on behalf of the building owner by Messrs. Hampton. To this the architects promptly reply that they have nothing to do with a certificate from the building owner, but that Messrs. Hampton had to do only with Mr. Shail. In those circumstances application was made by Messrs. Hampton to Mr. Shail, and he, the builder, made a payment of 200*l.*, and in his own ledger credited that to himself as a payment made to his merchant, the person whom he was dealing with, namely, Messrs. Hampton. That, my Lords, I think is conclusive as to the fact of the persons between whom this contract was made. In those circumstances, my Lords, fortunate or unfortunate as it may have turned out for the tradesman that he dealt with the builder, he cannot now, I fear, be permitted to set up a privity of contract with some one else, namely, the owner.

H. L. (E.) LORD PARMOOR. My Lords, I agree. This was a lump sum building contract for 13,600*l.* in quite a usual and common form. 1916 A provisional sum was included in the contract items, an amount of 450*l.*, in reference to a heating apparatus.

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Now the object of including a provisional sum or sums in a lump sum contract is that the employer, when he receives a tender for the whole work, may receive an inclusive amount, so that he may know that the sum, in this case 13,600*l.*, is inclusive of the entire work. There is certainly no inference of agency, such as is suggested, to be drawn from including in a lump sum contract a provisional sum. I am quite unable to follow the argument that because there is a provision for a lump sum there is any implication of agency as between the building owner and the contractor. The work referred to in the provisional item is, in my view, part of the work which the contractor has accepted the primary obligation to complete within a given time and for a given payment. This obligation is part of the basis of the whole contract where the contract is for a lump sum. It may be optional to the building owner under the terms of the contract to undertake the work to which the provisional sum is referable, or to employ a sub-contractor; but in this case, if he had such an option, it was certainly not exercised. There is no evidence of any privity of contract of any kind between the county council, who are the building owners, and the appellant. I agree with what Pickford L.J. says, that you simply have to see in a case of this kind with whom the contract has been made, and I can come to no other conclusion than that the appellant made his contract with the building contractor as principal and not with the building owners, or any agent with authority to make them liable.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 9, 1916.

Solicitors for appellant: *Bell, Brodrick & Gray, for Cousins & Botsford, Cardiff.*

Solicitors for respondents: *Broad & Son.*

[HOUSE OF LORDS.]

O'CONNOR AND OTHERS	APPELLANTS ;	H. L. (I.)*
	AND		1916
TANNER	RESPONDENT.	<u>Nov. 13.</u>

THIS was an appeal from an order of the Court of Appeal in Ireland affirming a judgment of the Master of the Rolls upon the construction of a settlement, reported sub nom. *In re Boyd's Trusts, Devereux v. Calm.* (1)

The case does not call for a report, as the House determined the question of construction solely upon the language of the particular settlement.

The HOUSE (Viscount Haldane, Lord Atkinson, and Lord Parmoor), without calling on counsel for the respondent, dismissed the appeal.

Counsel for appellants : *O'Connor, S.-G. for Ireland, S. L. Brown, K.C.*, and *St. L. Devitt* (all of the Irish Bar).

Counsel for respondent : *Jellett, K.C.*, and *J. E. Walsh* (both of the Irish Bar).

Solicitor for appellants : *G. Gavan Duffy, for M. J. O'Connor, Dublin.*

Solicitors for respondent : *Waddilove & Johnson, for Little & Elgee, Wexford.*

* *Present* : VISCOUNT HALDANE, LORD ATKINSON, and LORD PARMOOR.

[HOUSE OF LORDS.]

H. L. (E). * GRAY APPELLANT ;
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Nov. 23. LORD ASHBURTON RESPONDENT.

Arbitration—Costs—Discretion of Arbitrator —Power to order Successful Claimant to pay Costs—Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), Sched. II., rr. 14, 15.

By the Agricultural Holdings Act, 1908, Sched. II., r. 14, the costs of an arbitration under the Act “shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid ”; and by r. 15 the arbitrator in awarding costs is to take into account (inter alia) “the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise.”

A claim by a landlord against the tenant of a farm for dilapidations was referred to arbitration under the Agricultural Holdings Act, 1908. The arbitrator stated a special case for the opinion of the county court upon the question of the tenant’s liability under the lease, and this question was ultimately decided in the landlord’s favour. The arbitrator by his award awarded the landlord as compensation one tenth of the amount claimed and directed that each party should bear his own costs of the litigation as to liability and that the remainder of the costs of the arbitration should be borne by the landlord :—

Held, that the arbitrator was acting in the exercise of his discretion, and that, in the absence of proof of misconduct or want of jurisdiction, the award could not be set aside.

Foster v. Great Western Ry. Co. (1882) 8 Q. B. D. 515 discussed.
Decision of the Court of Appeal [1916] 2 K. B. 353 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of the Divisional Court. (2)

The appellant (hereinafter called the tenant) was in occupation of Abbotstone Farm, Alresford, Hampshire, as tenant of the respondent (hereinafter called the landlord) from Michaelmas, 1902, to Michaelmas, 1913, when the tenancy was terminated. Upon giving up possession the tenant claimed compensation from the landlord

* *Present* : EARL LOREBURN, VISCOUNT HALDANE, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

under the Agricultural Holdings Act, 1908, in respect of improvements, and the amount of compensation was agreed by the valuers of the respective parties at 2929*l.* 16*s.* 9*d.* ; the landlord claimed the sum of 744*l.* 3*s.* 9*d.* from the tenant for dilapidations. The tenant disputed his liability to pay under the terms of the tenancy agreement, as varied by certain correspondence between the parties, and also the amount, and the matter was referred to arbitration. In the course of the arbitration the arbitrator stated a special case for the opinion of the county court upon the question of the tenant's liability. The county court judge decided this question in favour of the tenant, but the Court of Appeal reversed his decision and directed the arbitrator to proceed with the arbitration and to deal with the matter of all costs, including the costs before the county court judge and the costs of that appeal.

The arbitrator made and published his award on May 7, 1915, and thereby, after reciting the proceedings above set out, he awarded to the landlord the sum of 71*l.* 8*s.* 10*d.* as compensation on account of dilapidations, and directed that the landlord should pay the costs of the arbitration (except as thereafter directed) and the costs of the award. And he thereby further directed that each party should pay his own costs of and incidental to the special case and the proceedings in the county court and the Court of Appeal. Thereupon the landlord applied to the county court judge to set aside the award on the grounds, 1, that upon the face of the award it was bad in law ; 2, that the arbitrator had misconducted himself. Upon this application the arbitrator made an affidavit in which he stated that he had carefully considered the opinion of the Court of Appeal on the special case and also the discretionary powers in regard to costs conferred upon him by the Agricultural Holdings Act, 1908, and the Rules thereunder (1), and that after taking into

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(1) Agricultural Holdings Act, 1908, Second Schedule:—

Rule 14: "The costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid, and the costs shall be subject to taxation by the regis-

trar of the county court on the application of either party, but that taxation shall be subject to review by the judge of the county court."

Rule 15: "The arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of

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account and carefully considering the reasonableness or unreasonableness of the claim, the conduct of the parties, and generally all the circumstances of the case, he came to the conclusion that it was only fair and equitable that each of the parties should bear his own costs of and incidental to the special case and the proceedings in the county court and in the Court of Appeal, and that the remainder of the costs of the arbitration should be borne by the landlord.

The county court judge refused to set aside the award, and his decision was affirmed by the Divisional Court (Ridley J. and Lord Coleridge J.). The Court of Appeal (Lord Reading C.J., Warrington L.J., and Lush J.) reversed the decision of the Divisional Court and set aside the award on the ground that the Agricultural Holdings Act, 1908, did not intend to confer on the arbitrator any greater jurisdiction as to costs than that which was vested in a judge of the High Court, and that he had no jurisdiction to order a successful claimant to pay costs unless he had before him some material upon which he could exercise his discretion.

Clavell Salter, K.C., and Samuel H. Emanuel, for the appellant. The question of the extent of the arbitrator's discretion as to costs under the Agricultural Holdings Act, 1908, is governed solely by the language of that Act, and by rr. 14 and 15 of the Second Schedule to the Act the widest possible discretion is conferred upon the arbitrator. In making this award, as explained by the affidavit of the arbitrator, he was acting within the express terms of the statute, and there is no ground for the suggestion that he has exceeded his jurisdiction or has misconducted himself. Assuming that the analogy of the practice of the High Court as to costs applies and that the arbitrator has vested in him only the same power over costs as a judge of the High Court, there is no such limitation upon the judge's discretion as was suggested by the Court of Appeal. As regards the liability to pay costs, there is a distinction between

amount or otherwise, and any unreasonable demand for particulars or refusal to supply particulars, and generally all the circumstances of the case, and may dis-

allow the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily."

a successful plaintiff, who has invoked the aid of the Court, and a successful defendant, who has been dragged into Court against his will, and there is no rule that a successful plaintiff cannot be made to pay costs.

[LORD ATKINSON referred to *Harris v. Petherick*. (1)]

Disturnal, K.C., and *William Allen*, for the respondent. On the facts appearing on the face of the award the arbitrator exceeded his jurisdiction and was guilty of misconduct in the legal sense of the term. If an arbitrator under the Agricultural Holdings Act, 1908, deals with costs otherwise than by discretion he is acting beyond his jurisdiction, because the central idea of the power conferred on him by the statute is discretion, and his only power is to award costs according to his discretion. Rule 14 gives power to the arbitrator to deal with costs according to his discretion and nothing else, and r. 15 does not enlarge that discretion; it does not suggest that the arbitrator may award costs to the unsuccessful party, but is confined to disallowing costs. As the Court of Appeal have held, there was not before the arbitrator any material upon which he could exercise his discretion, and he has not awarded costs in the exercise of his discretion at all. The discretion given to the arbitrator is the same as that given to a judge of the High Court. Sect. 5 of the Judicature Act, 1890, is in substantially the same terms as r. 14 of the Second Schedule. The term "discretion" has been explained in many cases in reference to a judge of the High Court, and the same meaning should be given to the term in this case, the position of the arbitrator being analogous to that of a judge. The practice as to costs in the High Court, as laid down by Jessel M.R. in *Cooper v. Whittingham* (2), is that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part the Court has no discretion and cannot take away his right to costs. That applies by analogy to this case. *Foster v. Great Western Ry. Co.* (3) is also in point. The decision of the Court of Appeal in that case was founded upon s. 28 of the Regulation of Railways Act, 1873, which gave to the Railway Commissioners a discretion as to costs in the widest terms. There the Court said that the award, which ordered the successful party to pay costs,

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(1) (1879) 4 Q. B. D. 611. (2) (1880) 15 Ch. D. 501, 504.

(3) 8 Q. B. D. 25, 515.

H. L. (E.) was not made in the exercise of any discretion at all and was therefore outside the jurisdiction of the Commissioners altogether ; and they were bound to say that because in that case, as in this, no appeal lay, as was clearly pointed out by Lord Esher. The statute now under consideration was passed in 1908 and it uses a phraseology which is perfectly well understood—similar words have been used in the Arbitration Act, 1889, the Judicature Acts, 1890, and the Workmen's Compensation Acts, 1897 and 1906—and the proper inference is that the word "discretion" in this Act is used in the sense in which it has been interpreted by the Court.

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EARL LOREBURN. My Lords, my real and sole difficulty in this case is that there has been a judgment of the Court of Appeal, for which I and all your Lordships entertain the greatest respect, and, although to my mind the thing seems plain, I cannot help having my judgment arrested by the reflection that it has appeared differently to those learned judges.

In this case in an arbitration under the Agricultural Holdings Act, 1908, the landlord claimed a sum of 740*l.* for dilapidations against the tenant ; the tenant disputed his liability and the Court of Appeal decided that he was liable. Then the amount went under the statute to arbitration, and the arbitrator awarded that the costs of that litigation which I have already mentioned should be disposed of by the successful landlord and the unsuccessful tenant each paying his own costs. As regards the amount claimed for dilapidations the arbitrator awarded the sum of 71*l.* instead of the sum of 740*l.* which had been demanded by the landlord. Then comes the order with regard to costs. The arbitrator directed that the landlord, although he had recovered 71*l.* out of the 740*l.* which he claimed, should pay the costs of the arbitration and the costs of the award.

Now the Divisional Court decided that this award could not be disturbed, but in the Court of Appeal the learned Lords Justices set aside the award. It was said by the Court of Appeal that it was wrong, in substance upon the ground that the arbitrator was bound as regards costs by the same principles and rules as were applicable to a learned judge of the High Court. My Lords, I do not wish to enter upon the question what are the principles

and rules which are binding upon a judge of the High Court in regard to costs, although I must not be taken to assent to the statements that have been made as to that; but I do not enter upon it because, with all respect, I do not see that the rules or practice of the learned judges have anything at all to do with this case. This case is regulated by an Act of Parliament of its own. The Agricultural Holdings Act, to which I will now advert for a moment, contains two clauses which I will not read at length; I will merely state in a sentence the substance of them. Clause 14 says "The costs of and incidental to an arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid"; and clause 15 says "The arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise." That is the statutory discretion which is given to the arbitrator, and he has sworn in an affidavit that he did look at the statute, that he did consider that very thing, the reasonableness or unreasonableness of the claim, in coming to a decision as regards costs.

My Lords, the effect of those two sections is that unless there is misconduct, which of course the Court can always survey, the arbitrator cannot be overruled in regard to his discretion about costs, provided that he is acting in the exercise of his discretion and in a case arising within his jurisdiction. It is said that this order was not made in the exercise of his discretion. With all respect to Mr. Disturnell, I think it was nothing else. It is said that it was not within his jurisdiction. I think the jurisdiction was intended for this particular class of case, and to my mind there is nothing more to be deprecated than placing a gloss upon the quite simple language of an Act of Parliament by reference to other Acts which contain different language. There is the Arbitration Act, there is the Judicature Act, there is the Workmen's Compensation Act, to which reference has been made, each of which speaks about costs in its own language and makes its own rules. There are also rules to be observed by learned judges which speak for themselves. But this Act also speaks for itself and it governs this case. In my view there is no ground whatever for suggesting any misconduct at all in a legal or any other sense against the arbitrator, and I

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H. L. (E.) think that this is simply a case within that class which was intended
1916 to be decided by the arbitrator. There was neither misconduct nor
GRAY want of jurisdiction, and I think this judgment ought to be
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VISCOUNT HALDANE. My Lords, I agree. In this case Lord Ashburton was virtually in the position of a plaintiff, and he has recovered a percentage out of a very large demand which he made, and the arbitrator in the exercise of his discretion has ordered him, although he succeeded as to a percentage, to pay the costs. The question is, was there power to make that order? Undoubtedly the words of the statute taken as they stand, and read as a plain man would read them, confer upon the arbitrator that discretion; but the Court of Appeal has held that these general words occurring in this particular statute are to be interpreted by analogy to the interpretation which has been placed on the rules made under the Supreme Court of Judicature Act.

My Lords, in the case of the rules which govern the procedure of the Courts it is said that the costs are to be in the discretion of the judge or the Court, but the very scheme of the Judicature Acts is that there should be an appeal from the judge who awards the costs to a Court of Appeal. That Court of Appeal also may therefore have to exercise the discretion which the rule confers. The Court of Appeal has laid down the practice, which is a rule of practice and not of principle restricting legal power, that it will not interfere with a discretion exercised by a judge of first instance in a matter in which discretion is entrusted to him, such as costs. But the Court of Appeal only applies that limitation of its powers in cases where the judge has acted, in exercising his discretion, on judicial principle, and on the proper principle. There are many cases in which the Court of Appeal interferes with costs, and it is always free to interfere as regards costs if it thinks that the judge has exercised his judicial discretion in a fashion that is not in accordance with settled principle.

My Lords, that is a very different thing from a case such as we have under this statute. The Court of Appeal seems to have first of all construed the statute by analogy to the rules of procedure to which I have referred—an analogy which is a misleading one

because it is not a case in which a Court is sitting to entertain an ordinary appeal. This very view is put in the judgments in another form, which appears most definitely in Warrington L.J.'s judgment, and that is that the words conferring the discretion are so construed that no difficulty arises from the fact that there is no appeal, because it was ultra vires to act in the manner in which the arbitrator in this case has acted. He has, it is said, dealt with matters which he had no power to deal with, because of an implied limitation, derived from the practice of the Supreme Court, which ought to be read into the words used.

My Lords, I again say that for the reasons I have already given I see no ground for reading in any such limitation. Even if you did read in the only limitation of the kind which I know of it would not help in this case. This is an instance in which the plaintiff is being deprived of his costs—a very different thing from making a defendant who has been completely successful in resisting the action pay the costs. There is authority for saying that under the unwritten practice of the old Court of Chancery, and I should think of the old Courts of Common Law too, the Courts did not treat themselves as having jurisdiction to order a completely successful defendant to pay the costs. But I know of no authority, and certainly *Cooper v. Whittingham* (1), which was cited, is not adequate authority upon the point, for saying that a plaintiff may not be made to pay the costs of an action even although he succeeds in a part of his claim.

My Lords, reliance was placed in the argument upon the case of *Foster v. Great Western Ry. Co.* (2) That was a remarkable case in many ways, and it may, or may not, have been rightly decided—it is not necessary for us to consider that here; for there were peculiar circumstances in the case. But, to begin with, it was a case in which the defendants, who had completely succeeded, were ordered by the Commission to pay the costs, and the Court of Appeal thought there was no jurisdiction to do that. If the only ground of the decision in that case had been the broad one that was put forward, I should have thought it necessary to examine the reasons given for the judgment and to have asked the question whether Bowen J., as he then was, had not taken the true view

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(1) 15 Ch. D. 501.

(2) 8 Q. B. D. 25, 515.

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when, in the Divisional Court, he decided, what the Court of Appeal overruled, that the discretion which was conferred upon the Commissioners by the statute was unfettered, and bore no analogy to any rules of procedure in Courts where there was an appeal. But there were other circumstances in the case which may, or may not, have sufficiently afforded a reason for saying that it was one where the Commissioners had no jurisdiction. Certainly, so far as general expressions which are used in the judgments, both of the Master of the Rolls and Cotton L.J., are to the effect that general words of discretion occurring in a statute which gives the Commissioners or an arbitrator power to award costs are to be cut down by importing limitations derived from the analogy of Courts of law, I should desire to guard myself against being supposed to give my approval to any such doctrine. When the Act of Parliament says that an arbitrator is to have full discretion as to costs I think the Act of Parliament must be taken to mean what it says. It is not the case of giving jurisdiction to an ordinary Court from which there is an appeal, and as to which there might be a review of the mode in which the discretion has been exercised contrary to some settled principle which governs the practice of the Court. It is a case of a purely statutory proceeding, and outside the limits of the statute you cannot go.

My Lords, for these reasons I am of opinion that the judgment of the Court of Appeal was wrong.

LORD ATKINSON. My Lords, I agree and I have very little to add.

In this case the only real litigant was Lord Ashburton, because the tenant's claim was admitted and practically agreed upon, and he was the cause of all the litigation that ensued and having put forward a claim for 740*l.* he succeeded in establishing 71*l.*

Now the case has been argued as if one should import into this 14th rule of the Second Schedule of the Agricultural Holdings Act, 1908, after the words "the costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid," the words "according to the

principles prevailing in the superior Courts." The whole argument was put upon that ground. Having adopted that construction, Mr. Disturnal goes on to argue that, as regards the words in r. 15 "the arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party," this reasonableness or unreasonableness can only be taken into consideration to deprive a person of such costs as he would get under the rules of the superior Courts. My Lords, it does not seem to me that there is any authority for making that limitation. The words are general. They cannot be limited in the way suggested. They afford, in my judgment, an entire warrant to the arbitrator for visiting with costs a plaintiff who persists in maintaining an extravagant and unreasonable demand. That is what the arbitrator has found has been done in the present case. When a claim of that character has been made the subject for consideration, it is obvious that some effect must be given to those words "the reasonableness or unreasonableness of the claim." The effect which the arbitrator has given to them is to make this litigant pay costs. I think that was perfectly legitimate. I do not think there is anything whatever in the statute itself to justify the limitation that has been contended for.

My noble and learned friend who has preceded me has already pointed out that *Foster v. Great Western Ry. Co.* (1) is no authority whatever for the proposition that a plaintiff, though successful in a small degree, may not be made to pay the costs of the defendant. Visiting a successful defendant with costs is an entirely different thing, because if he be successful he succeeds along the whole line.

My Lords, for these reasons, and for the reasons which have been given by my noble and learned friends who have preceded me, I think the judgment of the Court of Appeal was wrong and should be reversed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with all your Lordships, and I have but a few words to add.

I think, my Lords, the Act of Parliament in the present case is singularly plain. It does not confine itself to a declaration that

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H. L. (E.) the arbitrator shall have a discretion. Had it done so, probably
 1916 the result of the appeal to-day might have been the same; but,
 GRAY after stating the discretion in the arbitrator, it proceeds to say
 v. what this arbitrator charged with the discretion may do. It
 ASHBURTON expressly declares in the 14th rule of the Second Schedule of the
 (LORD). Agricultural Holdings Act, 1908, that he "may direct to and by
 Lord Shaw of whom and in what manner these costs or any part thereof are to
 Dunfermline. be paid," and in the 15th rule it declares that he "shall, in awarding
 costs, take into consideration the reasonableness or unreasonableness of the claim."

My Lords, confronted with an Act of Parliament so comprehensive and almost so peremptory, I decline respectfully to follow the proposition that you must import into it, for the purpose of restricting or limiting its terms, certain rules derived from the common law of England or from the practice of the superior Courts with reference to the discretion vested in judges.

The case of *Foster v. Great Western Ry. Co.* (1) has been cited, and I must express a certain surprise at the judgment of the Court of Appeal in regard to it. If the case of *Foster* (1) be fully analysed it will be found that that case, even if it were admissible in the present on the argument of analogy, which I decline to follow, would be an authority in favour of the appellant and not in favour of the respondent. It was, my Lords, in my view, apprehended in that sense by the learned Lord Chief Justice, because, after dealing with *Foster's Case* (1) and the rules applicable to the High Court of Justice, he sums up the proposition in this form: "You may nevertheless make the person who invokes the assistance of the Court pay the costs notwithstanding that he is successful." Applying that language to this case, I ask myself what more has the arbitrator here done than to make the claimant who invoked his assistance pay the costs notwithstanding that he was successful. I look to *Foster's Case* (1) as no authority in favour of the respondent.

But, my Lords, I have a second object in citing that case; it is that I may adopt for present use the general proposition on this part of the law laid down by the late Lord Bowen. He expressed

(1) 8 Q. B. D. 25, 29, 515.

himself in this language : “ It appears to us that in establishing an extraordinary tribunal of the kind the Legislature have in plain terms conferred upon them a wide discretion as to the manner in which they should deal with all questions of costs arising before them, and, provided that their decisions on such matters are bona fide, it is not for a Court of law to examine the principle on which such decisions are based.” I think this view entirely sound and that it applies a fortiori to the case of an arbitrator. May I venture to say again, my Lords, that I decline to import into the terms of a statute so plain and so comprehensive any restriction or limitation derived from the general law of England or any analogy between the position of an arbitrator and that of a judge.

My Lords, analogies are dangerous. Why an analogy with a judge in a Court of law ? I might as well be asked to import an analogy between the discretion exercised by the pilot or the captain of a ship, or the discretion exercised by an auctioneer who is expressly elected to be judge in a sale. In regard to the actings of an arbitrator, whether under the Agricultural Holdings Act or otherwise, two things especially were in the view of the Legislature, namely, first, finality, and, secondly, promptitude. The special danger of analogies with the case of a judge is particularly this, that in the exercise of judicial discretion there may be appeal from Court to Court. At this moment there is an appeal before this House depending upon the question of an exercise of judicial discretion, and to import any such analogy into the region of the discretion exercised by an arbitrator would be to destroy the whole virtue of that finality which it was the object of the Legislature to attain.

In conclusion, my Lords, I would only say that the view expressed by Lord Coleridge J. with regard to what the arbitrator had done in this case is exactly the view which I myself have adopted. I think, to use his Lordship’s language, that “ a very exorbitant claim was made, and it may be that the arbitrator might reasonably think that the arbitration was practically forced upon the tenant by its unreasonableness, and that if a reasonable claim had been put forward no arbitration would have resulted. If that be the case, then the discretion given him by the Agricultural

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*Order of the Court of Appeal reversed and order of the
 King's Bench Division restored. The respondent
 to pay the costs incurred in the Courts below and
 also the costs of the appeal to this House..*

Lords' Journals, November 23, 1916.

Solicitors for appellant: *Church, Adams, Prior & Balmer, for
 P. W. Snelling, Winchester.*

Solicitor for respondent: *H. S. Knight Gregson.*

[HOUSE OF LORDS.]

H. L. (E.)*	COMMISSIONERS FOR EXECUTING THE	} APPELLANTS;
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AND

OWNERS OF STEAMSHIP AMERIKA . . . RESPONDENTS.

*Admiralty—Ship—Collision—Damages—Loss of Life—Pensions to
 Relatives of Deceased Officers and Seamen.*

One of His Majesty's submarines was run into and sunk by a steamship and the crew were drowned. In an action of damage by collision brought by the Commissioners for executing the Office of Lord High Admiral of the United Kingdom against the owners of the steamship, the defendants submitted to judgment on the basis of paying to the plaintiffs 95 per cent. of their damage to be assessed by the Admiralty Registrar. The plaintiffs claimed as an item of damage the capitalized amount of the pensions payable by them to the relatives of the deceased men:—

Held, that the claim failed; first, on the principle of *Baker v. Bolton* (1808) 1 Camp. 493, that in a civil court the death of a human being could not be complained of as an injury, and, secondly,

* *Present*: EARL LOREBURN, LORD PARKER OF WADDINGTON, and LORD SUMNER.

on the ground of remoteness, the pensions being voluntary payments in the nature of compassionate allowances.
Decision of the Court of Appeal [1914] P. 167 affirmed.

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APPEAL from an order of the Court of Appeal in so far as it affirmed an order of the President of the Probate, Divorce, and Admiralty Division. (1)

On October 4, 1912, His Majesty's submarine B 2 was run into and sunk in Dover Strait by the steamship *Amerika*, and all the crew of the submarine, except one officer, were drowned, namely, an officer and fifteen sailors of the Royal Navy.

In an action for damage by collision instituted by the appellants, the Commissioners for executing the office of Lord High Admiral of the United Kingdom, against the respondents, the owners of the steamship, in the Probate, Divorce, and Admiralty Division, the respondents admitted that the *Amerika* was alone to blame for the collision, and agreed to pay to the appellants 95 per cent. of their damages, to be assessed by the Admiralty Registrar assisted by merchants. Among the items of damage claimed by the appellants was a sum of 5140*l.* representing the capitalized amount of pensions and grants payable to the relatives of the men who were drowned. These pensions and allowances were granted under statutory authority according to scales authorized by Orders in Council and prescribed by the King's Regulations.

The Assistant Registrar disallowed the claim, but assessed at 4100*l.* the sum which the appellants ought to recover if the claim was recoverable at law.

The report of the Assistant Registrar was affirmed upon this point by the President, and the order of the President was affirmed, so far as regards the question under appeal, by the Court of Appeal (Buckley L.J., Kennedy L.J., and Scrutton J.) on the principle laid down by Lord Ellenborough in *Baker v. Bolton* (2), that "in a civil court the death of a human being could not be complained of as an injury."

1916. July 20, 21. *Sir George Cave, S.-G.*, and *Laing, K.C.* (with them *Sir John Simon, K.C.*, and *Robertson Dunlop*), for the appellants. This appeal raises two questions: (1.) Can A. under any

(1) [1914] P. 167.

(2) 1 Camp. 493.

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circumstances recover damages for the death of B. by reason of the negligence of a third party? (2.) Can these particular damages be recovered? As to (1.): A master who loses the services of a servant by injury caused by the wrongful act of another can recover damages against the wrong-doer: *Dixon v. Bell* (1); *Hodsoll v. Stallebrass*. (2) Then does it make any difference that the injury results in the death of the servant? *Baker v. Bolton* (3) decides that the damages stop on death. But that decision is illogical and ought to be overruled. If a master may recover for an injury to a servant it is anomalous that he cannot recover for the greater injury, namely, the death of the servant. It has been said that the principle laid down by Lord Ellenborough is recognized by the Legislature in the preamble to the Fatal Accidents Act, 1846 (Lord Campbell's Act). The object of that Act was to get rid of the maxim *actio personalis moritur cum persona* for particular purposes, but that maxim has always been applied to the person who dies, and not to the person who suffers by the death of another, and the preamble when read with the operative part of the Act shows only that the representative of the deceased person could not sue. The Act provides a partial mitigation of the maxim, but it leaves untouched the question whether the master could recover for the death of his servant. The maxim has no application to the present right of action.

Baker v. Bolton (3) was followed by the majority of the Court of Exchequer (Kelly C.B. and Pigott B.) in *Osborn v. Gillett* (4), but it was severely criticized by Bramwell B., who dissented, and he subsequently adhered to his opinion. (5) It was followed again by the Court of Appeal in *Clark v. London General Omnibus Co.* (6), but it was considered and distinguished by the same Court in *Jackson v. Watson & Sons*. (7) *Berry v. Humm & Co.* (8) shows that under Lord Campbell's Act damages may be recovered for loss of services, and Scrutton J. there distinguishes *Osborn v. Gillett*. (4) The principle laid down by Lord Ellenborough is not so firmly established as to preclude this House from deciding this question in

(1) (1816) 1 Stark. 287.

(2) (1840) 11 Ad. & E. 301.

(3) 1 Camp. 493.

(4) (1873) L. R. 8 Ex. 88.

(5) 25 Sol. J. 813.

(6) [1906] 2 K. B. 648.

(7) [1909] 2 K. B. 193.

(8) [1915] 1 K. B. 627.

accordance with right and justice. [Upon this question *Higgins v. Butcher* (1); Pollock on Torts, 10th ed., p. 67; Beven on Negligence, 3rd ed., vol. 1, p. 181; and Blackstone, Comm. iii. 302, were also referred to.]

As to (2.): This damage is not too remote. The right of the appellants to recover does not depend upon their legal liability to pay the pensions, but it includes any payment which no decent person would refuse to make. The wrong-doer is liable for the natural consequences of his act, and in these days everybody must be taken to know that pensions and allowances are payable by the Admiralty on the death of a sailor in His Majesty's service. [Upon this point reference was made to *Williams v. Reynolds* (2); *The Annie* (3); *H.M.S. London* (4); *Considine v. McInerney*. (5)]

Inskip, K.C., and *Arthur Pritchard*, for the respondents, were not called on.

The House took time for consideration.

Dec. 19. EARL LOREBURN. My Lords, in my opinion this appeal fails. It is far too late for this House to disturb the rule expressed by Lord Ellenborough in *Baker v. Bolton* (6), even were we of opinion that the common law ought originally to have been differently interpreted, of which I am by no means persuaded. When a rule has become inveterate from the earliest time, as this rule appears to have been, it would be legislation pure and simple were we to disturb it. I also think that the damages sought are not in any way recoverable, because they represent sums of money which the appellants were not legally required to pay.

Your Lordships have been interested in ascertaining the origin of Lord Ellenborough's decision. I share in that interest, but I cannot throw any light on the subject beyond what may be derived from the opinions of Lord Parker and Lord Sumner, both of which I have had the advantage and the pleasure of reading.

LORD PARKER OF WADDINGTON. (7) My Lords, I agree. There are in my opinion two sufficient reasons why this appeal cannot

(1) (1606) Noy, 18; Yelv. 89.

(2) (1865) 6 B. & S. 495, 501.

(3) (1886) 12 P. D. 50.

(4) [1914] P. 72.

(5) [1916] 2 A. C. 162.

(6) 1 Camp. 493.

(7) Read by Viscount Mersey.

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succeed. The first is that the items of damage which the appellants desire to be allowed are too remote. The second is that no sufficient case has been made for overruling Lord Ellenborough's decision in *Baker v. Bolton* (1) to the effect that in a civil court the death of a human being cannot be complained of as an injury. I will deal with each of these reasons separately.

The items of damage which the appellants desire to have allowed consist of certain pensions and allowances, particulars of which will be found at pp. 39—42 of the appendix. These pensions and allowances are granted under statutory authority, but it does not appear that their grant formed any part of the contract between the Admiralty and the seamen whose lives have been lost through the respondents' negligence. They are, it seems, compassionate pensions and allowances only, which, from a legal standpoint, the Admiralty might have granted or withheld at its discretion. Under these circumstances they cannot constitute an item of damage. No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased. But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for services already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

Passing to the second of the reasons above mentioned, I may point out that the correctness of the ruling in *Baker v. Bolton* (1) has since been accepted, not only by all Courts in this country, but by the Supreme Court of the United States, nor can anything be found in the earlier authorities inconsistent with it. It was, it is true, severely criticized by Lord Bramwell in *Osborn v. Gillett*. (2) It was, he considered, anomalous that a master should be entitled to recover for loss of service if his servant were wrongfully injured, but should be without any remedy if his servant were wrongfully killed. If it were any part of the functions of this House to consider

(1) 1 Camp. 493.

(2) L. R. 8 Ex. 88.

what rules ought to prevail in a logical and scientific system of jurisprudence, much might no doubt be said for this criticism; though it is not, in my opinion, by any means clear that the anomaly does not in reality consist rather in granting the remedy in the former case than in refusing it in the latter. In a society based so largely as our own is at the present day upon contractual obligations, it does not appear why the wrongful injury of A. whereby he is prevented from fulfilling his contractual obligations to B. should confer on B. a right of action only where these obligations are those arising out of the relationship of master and servant, or, indeed, why the right should not be extended so as to cover all loss, whether arising out of inability to perform a contract or otherwise.

This House, however, is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision. The appellants have accordingly attempted to show that Lord Ellenborough's ruling was erroneous, as being based either (1.) upon a misconception of the limits within which the maxim *actio personalis cum persona moritur* is applicable, or (2.) upon the mistaken notion that the rule of public policy which, in cases of felony, admittedly requires the person aggrieved to institute criminal proceedings before pursuing any civil remedy against the felon, precluded such civil remedy altogether, or (3.) upon doctrines of Roman law which ought not to be applied at all. It is to be observed that Lord Ellenborough gave no reasons for his ruling: he treated the proposition he laid down as a well-known proposition of law, and the reasoning on which the proposition was based must therefore be found, if at all, in the earlier authorities. The only earlier authority to which your Lordships' attention was called was the case of *Higgins v. Butcher*. (1) This was an action in trespass by a husband for wrongful injury causing his wife's death. The action was dismissed. If it were looked on as an action in right of the deceased wife, the maxim *actio personalis, &c.*, was clearly applicable. If on the other hand it were looked on as an action by the husband in his own right, then the trespass was "drowned in the felony." Obviously the limits within which the maxim mentioned is applicable were already well known when

(1) *Noy*, 18; *Yelv.* 89.

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Higgins v. Butcher (1) was decided, and Lord Ellenborough with that case in his mind can hardly have fallen into the error suggested. Nor can I find any reason to suppose that any weight has ever been given in the Courts of this country to the Roman law on the subject. It remains, therefore, to consider whether the reason given in *Higgins v. Butcher* (1) that the trespass was drowned in the felony can be rejected as erroneous. It was contended that the reason must be rejected as a misconception of the rule of public policy above referred to. Whatever may have been thought in the early part of the seventeenth century, or even in Lord Ellenborough's day, it is now quite clear that the rule only suspends and does not require the destruction of the civil remedy. There can therefore, it is argued, be no drowning of the trespass in the felony, and if the reason given for the decision in *Higgins v. Butcher* (1) be bad, there is, it is contended, no reason why that case should stand, or why Lord Ellenborough's ruling, which was dependent on it, should not now be overruled by this House.

My Lords, before proceeding to deal with this point I should like to call the attention of the House to certain historical considerations which appear to me to be of considerable materiality. I do this with some diffidence, as I cannot lay claim to any special knowledge. I have, however, read a good deal of history in connection with this case, for it is almost a commonplace that apparent anomalies in our law can generally be explained if we consider the conditions of its historical growth.

If we carry our minds back to a period prior to the development under the influence of the Statute of Westminster the Second (13 Edw. 1, c. 24) of the action on the case, we find that the law of contract based on the doctrine of consideration had not yet taken shape. The basis of society was still status rather than contract, and the King's Courts had not yet invented any procedure for the enforcement of simple contract obligations. Nevertheless, among the writs which had become de cursu, there were several writs which a master could obtain from the Chancery in respect of wrongs done to his servant. Fitzherbert in his *De Natura Brevium* mentions (1.) a writ of trespass for taking away an apprentice or servant, and (2.) a writ of trespass for injury done to a servant per quod

(1) Noy, 18; Yelv. 89.

servitium amisit. These writs are in all respects analogous to the writs of trespass for taking away a wife or child, or for injury done to a wife or child *per quod consortium* or *servitium amisit*, and also to the writs of trespass for debauching a wife, daughter, or female servant. The inference is that all these writs arose out of status at a time when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract. This would appear to me to account for the fact that, except in the case of master and servant, the loss of A. arising out of an injury whereby B. is unable to perform his contract is not actionable. It is only in a society based on contractual obligation that the existence of such an action in the case of master and servant and in no other case can appear illogical.

Further, during the period in question the writ of trespass was the only remedy for wrongs such as those we are considering. According to Professor Maitland, trespass was a remedy for acts of violence not amounting to a felony. Certainly no writ of trespass can be found in which the acts of which the plaintiff complains necessarily amount to a felony. In some cases they may or they may not. Take for example the writ for breaking into the plaintiff's house and taking away his money. The acts complained of do not constitute burglary or larceny. There may be a burglary or larceny, according to whether certain additional facts be or be not proved, but the defendant cannot plead these additional facts: *Lutterell v. Reynell*. (1) He cannot set up his own felony by way of defence. The facts alleged in the writ are wrongful and actionable, whether these additional facts be proved or otherwise. It is not the felony which is made the subject of complaint. It should be remembered that for felony there was the appeal, and that, to use Professor Maitland's expression, the writ of trespass may be called "an attenuated appeal" dealing with acts of violence for which the appeal did not lie. It arose out of the appeal, and was a criminal as well as a civil proceeding, leading not only to the plaintiff recovering damage, but to the defendant being fined or imprisoned.

My Lords, during the period we are considering it is probable that all homicide by act of violence amounted to felony. Certainly

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H. L. (E.) intentional homicide or homicide through negligence was felonious.
 1916 It follows that the death of a human being occasioned by an act of
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 COMMISSIONERS complaint in an action of trespass. It could not be alleged without
 C. alleging felony, and for felony trespass would not lie. If the writ
 S.S. alleged only an injury per quod servitium or consortium amisit,
 AMERIKA. the writ would be unobjectionable, but if death ensued, damage
 Lord Parker of could be obtained up to the date of the death only. If the injured
 Waddington. person had been killed on the spot the action would fail altogether.
 The plaintiff's remedy, if he had any, would be the appeal.

My Lords, if for the reasons above suggested trespass did not lie on the part of a master for an injury causing the death of his servant, it is easy to see how this fact would influence the subsequent development of the action on the case. The writ-making powers of the Chancery, which for a time had fallen into disuse largely because they were thought to infringe on the legislative function of Parliament, received in 1285 A.D. a new impulse by the passing of the Statute of Westminster the Second, and began to be again used, as they had been originally used, to meet the needs of a growing civilization by providing legal remedies for grievances which, however much they might be recognized as such by the general sense of the community, were not yet actionable in the King's Courts. Consider for a moment the following examples: First, A.'s servant, in the course of serving A., negligently throws a beam of wood on to a highway, and in so doing injures B.'s servant. Under these circumstances B.'s servant had a writ of trespass against the wrong-doer, and B. also had a writ of trespass (per quod servitium amisit), but neither of them had any remedy against A., for trespass was in fact a criminal proceeding, and according to the common law no one could be called upon to answer in a criminal proceeding for another's crime. Nevertheless, the general sense of the community demanded such a remedy, and this was supplied by giving B. and B.'s servant an action on the case against A. By this means the modern law as to a master's liability for the acts of his servant was enabled to develop. The remedy of B.'s servant against A.'s servant was always confined to an action in trespass: see *Holmes v. Mather* (1), per Lord Bramwell. Secondly, suppose A.'s servant, in the course

(1) (1875) L. R. 10 Ex. 261, 268.

of serving A., placed a beam of wood on the highway and negligently left it there, so that B.'s servant fell over it and was injured. Under these circumstances neither B.'s servant nor B. himself had any remedy in trespass, for A.'s servant had committed no act of violence, for which alone a writ of trespass could be obtained from the Chancery. Nevertheless, the general sense of the community demanded a remedy, and such a remedy was again supplied by giving both B. and B.'s servant an action in case against both A.'s servant and A.

If in the first of the two examples I have given B.'s servant had been killed and not injured only, A.'s servant would have committed a felony and no action against him would lie in trespass. In developing the principle of *respondeat superior* it may well have been thought that A.'s liability for the act of his servant ought not in any case to be greater than the liability of the servant himself. Again, if in the second of the two examples B.'s servant, in falling over the beam, had broken his neck, it may well have been thought that neither A.'s servant nor A. himself ought to incur, by reason of mere nonfeasance, a liability greater than would have been incurred by actual violence. These considerations may well account for the doctrine that the death of a human being could not be complained of as an injury in an action on the case any more than it could in an action of trespass.

My Lords, I will now return to the case of *Higgins v. Butcher* (1), and I desire to suggest that it was not really based on any rule or supposed rule of public policy, but merely on the nature of an action in trespass. The declaration was by a husband for an injury to his wife. *Prima facie*, therefore, what was complained of was a trespass, but the declaration proceeded to state that the wife died of the injury. What was *prima facie* a trespass thus became a felony for which no action in trespass lay. The trespass was drowned in the felony. "For the King only is to punish felony, except the party brings an appeal." (2) If the case had turned on a rule of public policy, such rule would have been applicable to a writ in trespass for breaking into the plaintiff's house and taking away his money, where what had been done in fact amounted to burglary or larceny. I cannot discover that it was ever so applied. On the contrary

(1) *Noy*, 18; *Yelv.* 89.(2) *Noy*, 18.

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H. L. (E.) *Markham v. Cob* (1), decided in 1625, and *Dawkes v. Coveleigh* (2),
 1916 decided in 1652, are authorities that in such a case the trespass is
 ADMIRALTY not drowned in the felony, so as to preclude an action for the tres-
 COMMISSIONERS pass, provided the requirements of public policy are first satisfied.
 v. These cases were quoted with approval by Sir Matthew Hale
 S.S. (1 Hale, Pleas of the Crown, p. 546), and it cannot be disputed that
 AMERIKA. they are good law. Lord Ellenborough himself acted on them in
 Lord Parker of *Crosby v. Leng* (3) without any apparent hesitation, though *Baker v.*
 Waddington. *Bolton* (4) had been decided by him only a few years previously,
 namely, in 1808. It is true that neither *Higgins v. Butcher* (5) nor
Baker v. Bolton (4) were cited in argument. Of course, this may
 have been due to carelessness in examining the authorities, but it is
 quite possible that counsel did not consider that they had any
 bearing on a question of public policy.

The case of *Gimson v. Woodfull* (6) strikes the first discordant
 note. This was in 1825, and in 1827 the matter was discussed in
 the case of *Stone v. Marsh* (7), Lord Tenterden using language which
 might be construed to favour the view taken in *Gimson v. Wood-*
full. (6) The point was left open in *White v. Spettigue* (8), though
 that case overruled *Gimson v. Woodfull* (6) on other grounds.

In *Wellock v. Constantine* (9), decided in 1863, the plaintiff sought
 to recover damages for rape. Of course, if she had consented to the
 act alleged, there could be no civil remedy. If, on the other hand,
 she had not consented, she was in fact complaining of a felony, for
 which an action in trespass at any rate would not lie. Willes J.,
 being of opinion that no civil action would lie for a felony, intimated
 that he would direct a verdict for the defendant, and the plaintiff
 thereupon consented to a nonsuit. The case, therefore, appears to
 resemble *Higgins v. Butcher* (5), and has no necessary reference to
 public policy, though Pollock C.B., in discharging a rule for a new
 trial, seems to suggest that public policy was the real ground of
 decision. This also appears to have been the view of Blackburn J.
 in *Wells v. Abrahams* (10), for he disapproves *Wellock v. Constan-*

(1) (1625) Latch, 144; Noy, 82.

(2) (1652) Sty. 346.

(3) (1810) 12 East, 409.

(4) 1 Camp. 493.

(5) Noy, 18; Yelv. 89.

(6) (1825) 2 C. & P. 41.

(7) (1827) 6 B. & C. 551.

(8) (1845) 13 M. & W. 603.

(9) (1863) 2 H. & C. 146.

(10) (1872) L. R. 7 Q. B. 554.

time (1) on the ground that public policy demands only the suspension and not the destruction of the civil remedy, thus approving the earlier authorities to which I have referred. He obviously disagreed with the ruling of Willes J. that no civil action would lie for a felony, for, though he expressly approves the case of *Higgins v. Butcher* (2), he says it is a mistake to suppose it was decided on that ground. Unfortunately he does not suggest on what grounds he thought the decision could be supported.

That the rule of public policy only suspends and does not destroy the civil remedy is also shown by the subsequent cases of *Ex parte Ball* (3) and *Midland Insurance Co. v. Smith*. (4)

It should be noticed that Baggallay L.J., in laying down in *Ex parte Ball* (3) the propositions resulting from the authorities, says that a felonious act *may* (not that it *must*) give rise to a civil action. Before any question of public policy can arise it has first to be ascertained whether civil proceedings will lie at all. Most felonies involve a wrong less than a felony, and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings.

My Lords, it was in this state of the law as to public policy that *Baker v. Bolton* (5) came up for consideration before the Court of Appeal in *Clark v. London General Omnibus Co.* (6), and if that case be referred to it is quite apparent that neither the counsel who argued it nor the judges who were party to the decision considered that public policy had anything to do with the matter. Not one of the cases on the latter subject to which I have referred was so much as mentioned. Under these circumstances it seems impossible to suppose that the decision in either *Higgins v. Butcher* (2) or *Baker v. Bolton* (5) depended on a misconception of the rule of public policy. I think it more probable that this misconception, which at one time no doubt prevailed but which has been now dispelled, was itself due to a mistake as to the meaning of what was said in *Higgins v. Butcher* (2), that case itself merely deciding that felony could not be

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(1) 2 H. & C. 146.

(2) Noy, 18; Yelv. 89.

(3) (1879) 10 Ch. D. 667.

(4) (1881) 6 Q. B. D. 561.

(5) 1 Camp. 493.

(6) [1906] 2 K. B. 648.

H. L. (E.) made a ground of complaint in trespass, a decision which in *Baker v. Bolton* (1) was extended to cover all civil proceedings.

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Perhaps I ought to add one word on the case of *Smith v. Selwyn*. (2) That case resembled *Wellock v. Constantine*. (3) The statement of claim alleged and complained of a felony. There was an application to stay further proceedings or dismiss the action on the ground that it was based on a felony for which there had been no prosecution. Liberty was given to amend the claim by alleging only a wrong less than felony; otherwise the action was ordered to be stayed pending criminal proceedings. The question whether felony could itself be made a ground of complaint in a civil action, quite apart from any rule of public policy, does not appear to have been considered, and supposing the statement of claim had been amended in the way suggested, it would still seem that, under the authorities I have cited, public policy would, if there had been an actual felony, demand a stay until the plaintiff had done her duty by prosecuting the felon.

My Lords, under these circumstances I do not think the appellants can be said to have advanced any sound reasons why your Lordships' House should disturb a rule of law which has been so long recognized in our Courts, and which, however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds.

I agree that the appeal fails.

LORD SUMNER. My Lords, this appeal has been brought principally to test the rule in *Baker v. Bolton* (1) that "in a civil court the death of a human being cannot be complained of as an injury," a rule which has long been treated as universally applicable at common law. Some attempt was made to contest it only in its application to the case of master and servant. I will discuss both the narrower and the wider proposition, but it is clear that the action was not brought for the loss to a master of the services of his employee, but for the respondents' bad navigation, which sank the Crown's submarine, and the item of damage now in dispute, namely, pensions and allowances to dependants of seamen who were drowned, was claimed merely as one of the natural consequences of

(1) 1 Camp. 493.

(2) [1914] 3 K. B. 98.

(3) 2 H. & C. 146.

the tort, which consisted in sinking the ship. No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned, and so different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment that it may be questioned whether in any case an action per quod servitium amisit could have been brought at all.

My Lords, never during the many centuries that have passed since reports of the decisions of English Courts first began has the recovery of damages for the death of a human being as a civil injury been recorded. Since Lord Ellenborough's time the contrary has been uniformly decided by the Court of Exchequer and by the Court of Appeal. In addition to the weight of Lord Ellenborough's name (no mean authority even when sitting at nisi prius in spite of Lord Campbell's sneer), the rule has been definitely asserted by Lord Selborne (*Clarke v. Carfin Coal Co.* (1)), Lord Bowen (*The Vera Cruz* (2)), and Lord Alverstone and Lord Gorell (*Clark v. London General Omnibus Co.* (3)). It has been accepted as the rule of the common law by the Supreme Court of the Dominion of Canada (*Monaghan v. Horn* (4)) and the Supreme Court of the United States of America (*The Corsair* (5)).

That the rule has also received statutory recognition appears to me to be abundantly plain. I agree that the preamble to the first section of Lord Campbell's Act should be read as applying to the particular defect in the existing law which it was passed to remedy, namely, the disadvantageous position of widows and children, and not to the limited rights of masters and employees, though only Bramwell B.'s intrepid individualism could dismiss it as a "loose recital in an incorrectly drawn section of a statute, on which the Courts had to put a meaning from what it did not rather than did say": *Osborn v. Gillett*. (6) Still I think that the view taken by the Legislature in 1846 is clear. Sect. 6 of Lord Campbell's Act provides that "nothing therein contained shall apply to that part of the United Kingdom called Scotland." Why? Because Scotch

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(1) [1891] A. C. 412, 414.

(4) (1882) 7 Can. S. C. R. 409.

(2) (1884) 9 P. D. 96, 101.

(5) (1892) 145 U. S. 335.

(3) [1906] 2 K. B. 648.

(6) L. R. 8 Ex. 95.

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law differed from English law in the very point in question, and in this respect is for once illogical. The rule, says Lord Watson in *Clarke v. Carfin Coal Co.* (1) and again in *Wood v. Gray & Sons* (2), which allows "actions for solatium and damages . . . at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent . . . does not rest upon any definite principle . . . but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom, and having no other ratio to support it." "Lord Campbell's Act," says Turner L.J. with the concurrence of Knight Bruce L.J. in *Glaholm v. Barker* (3), "first introduced into the law of this country a remedy in case of injuries attended with the loss of life; the law up to the time of the passing of this Act having stood thus—that in case of death resulting from injury the remedy for the injury died with the person." It provided a new cause of action and did not merely regulate or enlarge an old one. It excluded Scotland from its operation because a sufficient remedy already existed there when in England none existed at all. So much seems to me to be indubitable. It did not deal with the case of master and servant as such, presumably because the Legislature found nothing in the common law rule in this regard which called for reconsideration. I think the observation of Pigott B. in *Osborn v. Gillett* (1) was perfectly just. "We are not at liberty to disregard the law thus established so long ago and expressly recognised by the Legislature, nor in effect to add by the decision of this Court another clause to Lord Campbell's Act." It is worthy of observation that the passing of Lord Campbell's Act was followed shortly afterwards by similar legislation in the States of New York in 1847 and 1849 and of Maryland in 1852, and statutes similar in effect have since been passed in most of the older States of the Union where the common law prevails. Massachusetts had already dealt with the matter, though only tentatively, by direct enactment (c. 81 of 1786), which made the township as the highway authority liable in certain cases, when death was caused on highways, and by an Act of 1840, which provided that a railway company, whose negligence had caused a fatal accident, should be liable on indictment to payment of a fine to the use of the personal representative of the

(1) [1891] A. C. 418.

(2) [1892] A. C. 576, 581.

(3) (1865) L. R. 1 Ch. 223, 227.

(4) L. R. 8 Ex. 93.

deceased for the benefit of his family. Plainly it was, and long had been, the general opinion among students of the common law that the rule was as stated by Lord Ellenborough. "The authorities are so numerous and so uniform to the proposition," said the Supreme Court of the United States in 1877 in *Insurance Co. v. Brame* (1), "that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question." Since the early part of the last century the subject has been learnedly discussed on many occasions in the United States, both in connection with claims for the death of a servant and claims for the death of a relative. The re-argument in *Hubgh v. New Orleans and Carrollton Railroad Company* (2) is particularly valuable for its contrast of the common law with the old French law and with the effect of art. 1382 and art. 2294 of the Code Napoléon, as repeatedly interpreted in the Cour de Cassation. So much for this rule as a proposition of general application.

My Lords, I think that, as the appellants have argued this case as if the action had been brought by a master for the loss of a servant's service, it is better to deal also with this aspect of it. The point was concluded against the appellants in the Courts below by *Osborn v. Gillett* (3) and *Clark v. London General Omnibus Co.* (4) The question is whether there is any ground of principle on which your Lordships ought to overrule decisions of such authority and long standing. The case is put thus: "It is admitted that a master has an interest in his servant's life, such as to support an action if the servant is maimed; how can it be right that the tortfeasor should escape if instead of maiming the servant he kills him? Is the general rule of liability for tortious injury to the servant's health subject to an exception in relief of the tortfeasor if death ensue?" Some most learned writers have expressed dissatisfaction with the rule. It has been even suggested that Lord Ellenborough was "the victim of a confusion of ideas" and that the rule arose from a misunderstanding of the principle that a right of action for a tort, where the act done was felonious, is suspended till the tortfeasor has been prosecuted. The hope—perhaps a faint one—was long

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(1) (1877) 95 U. S. 754, 756.

(3) L. R. 8 Ex. 88.

(2) (1851) 6 Louisiana Annual, 495.

(4) [1906] 2 K. B. 648.

H. L. (E.) ago expressed that some day your Lordships might overrule
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I think it is clear that the relation of master and servant presents in this matter some peculiar features. What is the right in the master which the tortfeasor infringes, or the duty towards him which he disregards? Ordinarily an action of tort is given to defend rights of property or rights of personal safety, personal freedom and personal reputation. The latter must be confined to the person of the master, and in the person of the servant he has no property. Here is the beginning of anomaly.

I do not know, and doubt if it can now be ascertained, when or pursuant to what theory this special right of the master in relation to his servant was first established. The inquiry belongs to history rather than to positive law. Tindal C.J. in *Grinnell v. Wells* (2) observes of the most artificial aspect of this cause of action "the foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter, has been uniformly placed, from the earliest times hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. . . . It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant: and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter." So nearly did the wrong, which is the subject of this cause of action, approximate to wrongs to his property that a count for debauching the plaintiff's daughter could be joined with a count for breaking and entering his house: *Woodward v. Walton* (3); and a man could join with a count for an assault on himself another for an assault on his wife "per quod consortium uxoris for three days amisit": *Guy v. Livesey*. (4) Thus it is that the tortfeasor is liable to another's servant if he beats him, for the act is actionable per se; but he is only liable to the master of the servant if the beating interferes with the service, for at the master's suit it is only actionable per quod:

(1) 1 Camp. 493.

(2) (1844) 7 Man. & G. 1033, 1041.

(3) (1807) 2 Bos. & P. N. R. 476.

(4) (1618) Cro. Jac. 501.

Robert Marys's Case. (1) They are two separate causes of action in two different persons in respect of the same act. Again, where there is no capacity for service, as in the case of an infant of tender years, the father's action per quod servitium amisit will not lie: *Hall v. Hollander*. (2) If the contract of service had already determined before the wrongful act had any disabling effect upon the capacity to serve, as might be the case when a wrongful act is done to a servant who is under notice, I take it likewise that the action would not lie. It is the loss of service which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant. The contract of service being purely personal determines with the servant's death. As he dies, eo instanti the master's right is extinguished. A cause of action, which essentially depends on the present existence of a right to services, cannot be asserted in respect of a state of things which is inconsistent with the existence of such a right. It cannot be changed from an action for injury to the right (for in tort the wrongful act of the defendant and an invasion of the right of the plaintiff must concur) into an action for damage arising upon an event, otherwise an action would lie for causing the death of one's cestui que vie. A similar explanation is applicable to the case of a husband's action for injury to his wife per quod consortium amisit. The right is not in the life but in the service or consortium during life. "Death following instantly upon the act complained of," says the Supreme Court of the United States in *Lucas v. New York Central Rail Road Company* (3), "there was no time during her life when it could be said that the husband had lost the services of his wife in consequence of the injury complained of." Such an explanation was offered by the Court in *Monaghan v. Horn* (4), and it has the approval of Sir Gorell Barnes P. in *Clark v. London General Omnibus Co.* (5) For my own part I think it is sound in this sense, that whether or not it be the theory on which those who introduced these causes of action would have justified them, as indeed we may be sure it is not, it at any rate provides, though somewhat imperfectly, an intelligible basis for the existing rule sufficient to prevent

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(1) (1612) 9 Rep. 113a.

(3) (1855) 21 Barbour, 245.

(2) (1825) 4 B. & C. 660.

(4) 7 Can. S. C. R. 409.

(5) [1906] 2 K. B. 648.

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your Lordships from interfering with long-standing decisions on the plea that they are insensible or arbitrary.

Mr. Solicitor urged that such a principle is highly technical and that, if a minor hurt to a servant gives a cause of action to a master, a fortiori must the major hurt which results fatally, and he reminded your Lordships that this House in the case of *The Bernina* (1) overruled *Thorogood v. Bryan* (2), a case of long standing, and exhorted your Lordships to take heart and do likewise. This is hardly the right view to take of your Lordships' judicial functions nowadays, nor does it follow, in the case of a legal system such as ours, that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which, though imperfect, are well established and well defined. Again, an established rule does not become questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful. The explanations given of the rule in question are singularly varied. Hale (*Pleas of the Crown*, vol. 1, p. 477) says that a man shall forfeit his goods, though the verdict be quod interfecit per infortuniam et non per feloniam, "because the King hath lost his subject and that men may be the more careful." Certainly the idea of liability for breach of a duty to use care towards one's fellow-subjects was of slow growth. Again Parke B. says in *Armsworth v. South Eastern Ry. Co.* (3) that the rule had two reasons, "first, because the law provides remedies for such mischiefs only as affect legal rights; and a man has not such a legal right in the life of his parent as he has in his own," while, secondly, "it was considered impossible to form an estimate of the value of human life either to a man himself or to others connected with him." Whether, as some have thought, the Roman law affected the matter in the distinction which it drew in various connections between the value of a slave's life and that of a free man it is probably impossible now to tell. The true explanation and the basis may be, as in our law they often are, purely historical. As is well known, it was long part of English law, when civil injuries and criminal offences had not been clearly distinguished, that among emendable offences there was included homicide, for which payment of wite to the King,

(1) (1888) 13 App. Cas. 1.

(2) (1849) 8 C. B. 115.

(3) (1847) 11 Jur. (O.S.) 758, 759.

or in some cases to the lord, and of bot to the kinsfolk constituted satisfaction. The elaboration of this tariff and the heavy burden of the payments for which it provided in the case of various injuries seem to have been the cause of the disappearance of this system. It passed away very rapidly, partly through the rise of criminal jurisdiction over offences against the King's peace and partly through the attraction of the new action of trespass. The change had taken place before records of decisions begin. Thereafter, while damages were recoverable by the injured man in his lifetime for trespass to his person, homicide became punishable upon indictment, and in Bracton's day was regarded as felonious. Those homicides which were due to negligence could be and were dealt with by the exercise of the King's mercy. On the one hand homicide, which deserved punishment, ceased to be emendable; on the other personal torts, actionable in trespass, were compensated in damages; the intermediate case of an act, tortious but not heinous, causing death was dealt with by the Royal mitigation of the punishment naturally attaching to homicide. There was, I imagine, in early times no actual decision in which it was held that in a civil court the death of a human being could not be complained of, still less was any legal theory advanced in justification of such a rule. Following the development of law through the modification and development of procedure, the system of making satisfaction for homicide by payment of wer and wite died out after the twelfth century; it was dealt with as a punishable felony, with or without mitigation of punishment, in proceedings on the King's behalf. Relatives, who in the time of Henry I. would have been paid by the manslayer in accordance with the rank of his victim, in the time of Edward I. had lost that right and yet could not bring trespass, and this by a process of procedural change and not, so far at least as is known, on any analysis of the nature of the cause of action. Doubtless lawyers as familiar with fatal accidents due to mere negligence as we are would have analysed the injury and have distinguished fully between killing with intent to kill, killing by an intended act without intent to kill but in breach of a duty towards the victim, and killing without either intent or breach of duty by mere misadventure; but in days when negligence causing death was probably rare as compared with our day, and the guilty party more often

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than not had nothing with which to pay damages, men acquiesced without discussion in a procedure by which the Royal justice dealt with homicide of all kinds, and actions of trespass did not deal with homicide at all. No doubt it is the tradition of this change that was preserved in the language of Tanfield J. in *Higgins v. Butcher* (1), "the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony," to which the report in Noy, p. 18, adds, "for the King only is to punish felony except the party brings an appeal." Though no longer in accordance with the formal law as stated by Cockburn C.J. in *Wells v. Abrahams* (2) and by Baggallay L.J. in *Ex parte Ball* (3), this was historically not far from the truth.

Parallel with the respective proceedings in trespass and on the case and on indictment there remained the right of appeal. For many years an appeal was more common than an indictment in cases of homicide, and the judges were careful to preserve the relatives' private right to the appeal and to secure that they should not be prejudiced by the course taken by or in the name of the Crown. The liability of the manslayer to punishment might be discharged by the King's pardon, or by the appellant's release, but in case of the former the appellant's right was saved, so that the King's pardon could not be pleaded to defeat the appeal. Out of this there arose the practice of using the appeal as an engine of compulsion, by which the slayer was driven to make compensation in order to obtain the appellant's release. In the appeal there were risks on both sides, for if the appeal failed the appellee had his action on the case for a false and malicious appeal. Down to the end of the fifteenth century appeals were nevertheless common, but the statute 3 Hen. 7, c. 1, after reciting that in appeals "the party is oftentimes slow, and also agreed with . . . also he that will sue any appeal, must sue in proper person, which suit is long and costly, that it maketh the party appellant weary to sue," enacts that indictments should no longer be held back "so that the suit of the party may be saved," but are to be proceeded with at once. Eventually appeals fell much into disuse; but they are mentioned from time to time, and a reported instance occurs, which is instructive,

(1) Yelv. 89.

(2) L. R. 7 Q. B. 554.

(3) 10 Ch. D. 674.



in 1 Croke's Eliz. (1599), pp. 632 and 682, *Phillida Shackborough v. Biggins or Biggen*. Here in a widow's appeal for murder, in which the act was held to have only been manslaughter, the Queen's pardon was relied on. It was decided, with some difference of opinion, that the pardon did not get rid of the appellee's liability to be burnt in the hand, it being the suit of the party and not an information in the Star Chamber, which was the suit of the Queen. On this the appellee promptly paid the appellant forty marks, and the suit was discontinued. There is little subsequent record of similar cases. In 1770 in *Bigby v. Kennedy* (1) it is stated that there had been no such case for nearly half a century, and, as eventually the appellant did not appear and a nonsuit was entered, no doubt the appellee had satisfied her demands. In *Ashford v. Thornton* (2) in 1818, the case which led to the abolition of appeals by 59 Geo. 3, c. 46, s. 1, Bayley J. observes: "This mode of proceeding, by appeal, is unusual in our law, being brought, not for the benefit of the public, but for that of the party, and being a private suit, wholly under his controul. It ought, therefore, to be watched very narrowly by the Court; for it may take place after trial and acquittal on an indictment at the suit of the King; and the execution under it is entirely at the option of the party suing, whose sole object it may be to obtain a pecuniary satisfaction." In this sense down to 1819 the death of a human being could be complained of in a civil court, for the appeal, though "a vindictive action," was on the civil side of the Court, but it could not be complained of "as an injury," and the rule as stated by Lord Ellenborough stands untouched.

My Lords, I think the history of the disappearance of wergild and the persistence of the appeal for homicide, which is to be found in full in the works of Hawkins, Fitzjames Stephen, and Pollock and Maitland, proves, if proof were needed, that Lord Ellenborough's canon correctly states the law and is one which is not now susceptible of expansion by judicial interpretation. There never was an action to recover damages for the death of a human being in the sense now contended for, and the remedy by appeal which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated, had any such

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(1) (1770) 5 Burr. 2643.

(2) (1818) 1 B. &amp; Al. 405, 457.



H. L. (E.) 1916 action at law been possible, for it was long a form of legalized blackmail.

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The historical explanation of the absence of such an action at the suit of relatives applies equally to the case of a master's claim for the death of a member of his familia, for example, a servant. It is equally incapable of judicial creation. Indeed, what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.

The canon in question has often been classified under the maxim *actio personalis moritur cum persona*, and ill-advised arguments have sometimes suggested that, even as applied to the case of master and servant, it has something to do with the abatement of actions. The maxim itself has many critics; it has been coldly disparaged as post-classical, meaning thereby that it is bad Latin: *Finlay v. Chirney* (1); it has been suggested to be a mistake for *actio poenalis* (Poste's *Gaius*, 2nd ed., p. 493), whence it is sometimes insinuated that it is bad law; and it has been peevishly described as "a wretched saw" and as "a purely identical proposition": Austin's *Jurisprudence*, 3rd ed., vol. 2, p. 1013. Of course reliance on the maxim in this connection leads to the effective retort that the person who has the action is the master and he is alive and sues just because some one else, his servant to wit, is dead. If, however, this maxim is put aside, since in the present case it is irrelevant, I think that the argument that your Lordships should discover under this ancient form of action some principle hitherto undetected is really an appeal to this House in its legislative and not in its judicial capacity.

My Lords, apart from the question of civil liability for the death of a human being, there is another aspect of this case. Injury is the gist of any action of negligence; if the negligence does no damage no action lies. In the present case the sums claimed were paid to widows and other dependants of the drowned men under Admiralty Regulations (pars. 1974 A1 and 2011 A), which expressly declare that these are compassionate payments, and granted of grace and not of right, both in kind and in degree. True that in such cases they are always made, and most properly made, but none the less the money

claimed was lost to the Exchequer directly because the Crown through its officers was pleased to pay it. The collision was the causa sine qua non ; the consequent drowning of the men was the occasion of the bounty ; but the causa causans of the payment was the voluntary act of the Crown. Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of a contractual obligation. In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy (*Bradburn v. Great Western Ry. Co.* (1)), and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's services sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead. The appeal is enterprising and has been of considerable interest, but I think it fails.

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*Order of the Court of Appeal affirmed and appeal dismissed with costs.*

*Lords' Journals, December 19, 1916.*

Solicitor for appellants : *Treasury Solicitor.*

Solicitors for respondents : *Pritchard & Sons.*

(1) (1874) L. R. 10 Ex. 1.

## [PRIVY COUNCIL.]

J. C.\*      TRUSTEES OF THE ROMAN CATHOLIC }  
 1916      SEPARATE SCHOOLS FOR THE CITY OF } APPELLANTS ;  
Nov. 2.      OTTAWA . . . . . }

AND

MACKELL AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,  
 APPELLATE DIVISION.

*Ontario—Separate Schools—English-French Schools—Restriction of Use of French—Validity—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1—Common Schools Act, 1859 (22 Vict. c. 64), s. 79, sub-s. 8.*

In Ontario there are two classes of free primary schools, namely, public schools and separate schools, the latter being denominational schools established under the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada). The appellants were the elected trustees of the Roman Catholic separate schools in Ottawa, and under the above Act had power to determine the “kind and description” of separate schools to be established therein and power to manage them. In 1913 the Department of Education for the province, under provincial statutory powers to make regulations, issued a regulation restricting the use of French in schools, whether public or separate, in which French was a language of instruction and communication.

Sect. 93 of the British North America Act, 1867, enacts that for each province the Legislature may exclusively make laws in relation to education, but by sub-s. 1 provides that “nothing in any such laws shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have in the province at the Union.” The appellants contended that the regulation was invalid under the above sub-section and was not binding upon them :—

*Held*, (1.) that the class of persons for whom the protection of the sub-section is claimed must be a class determined by religious belief and not by race or language; (2.) that the power of the appellants as trustees to determine the “kind and description” of schools did not extend to determining whether English or French should be the language of instruction; (3.) that the regulation

\* *Present* : LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

did not prejudicially affect any right or privilege secured by law at the Union to Roman Catholics in the province, and that it was consequently valid and binding upon the appellants.

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APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (July 12, 1915), affirming the judgment of Lennox J. at the trial.

The appellants were the duly elected trustees of the Roman Catholic separate schools established and maintained in Ottawa under the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada).

The respondents, who sued on behalf of themselves and all other supporters of the above-mentioned schools, brought an action in the Supreme Court of Ontario praying for a mandatory order against the appellants to conform to and enforce, in the schools under their control, certain regulations made by the Department of Education for that province. The appellants by their defence alleged that the regulations referred to were ultra vires and in violation of s. 93, sub-s. 1, of the British North America Act, 1867, which is set out in the head-note. The regulation more particularly in question, and which alone was the subject of the present appeal, was regulation 17 contained in a Circular of Instructions issued by the Department on August 17, 1913.

By the Common Schools Act, 1859 (22 Vict. c. 64, Upper Canada), common schools, now called public schools, were established for free primary education in the province. By the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada), Roman Catholics in the province were given the right to establish separate schools, Roman Catholic ratepayers being allowed to have the school rates which they paid allocated to those schools. Under s. 7 of the latter Act the elected trustees of separate schools had in relation thereto the powers of management and control given to the trustees of common schools by the Common Schools Act, 1859. Both classes of schools were attended by children some of whom spoke English, some French, and some both languages.

The Department of Education, as successors to the Council of Public Instruction, had power to make regulations for common schools under s. 119, sub-s. 4, of the Act of 1859, and for separate schools under s. 26 of the Act of 1863.

The material part of regulation 17 of 1913, which is set out in full

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at 32 Ont. L. R. 252, was to the following effect. Clause 1 stated that for convenience of reference the term English-French was applied to those schools, whether public or separate, in which French was a language of instruction and communication, and which should be annually designated by the Minister of Education. By clause 2, the courses of study prescribed for public schools, except as to religious teaching and allowing separate schools to use Roman Catholic readers, were to be in force in English-French schools. By clause 3, in both public and separate schools, the use of French was not to be continued beyond the first (i.e., the lowest) form, except upon the approval of the chief inspector. By clause 4, French was preserved as a subject of study, provided that it did not interfere with the adequacy of the instruction in English. Clause 5 provided for the inspection of English-French schools, the inspectors being required (clause 10) to report if any regulation was not properly carried out. Clause 13 required that teachers in English-French schools should possess a knowledge of English sufficient to teach the prescribed courses of study.

On April 29, 1914, Falconbridge C.J.K.B. made a mandatory order against the appellants to conform to and enforce the regulations in all the schools under their control. Upon the appellants failing upon September 1, 1914, to open the schools according to law, Lennox J. ordered them to do so; they did not comply with that order. The action was tried by Lennox J. The learned judge (whose judgment is reported at 32 Ont. L. R. 245) declared, *inter alia*, that the regulations in question were *intra vires* and made the injunction perpetual, subject to such order as the Court might see fit to make, upon it being shown that the appellants intended to conduct the schools according to law.

On appeal to the Appellate Division (Meredith C.J.O. and Garrow, Maclaren, Magee, and Hodgins J.J.A.) the judgment was affirmed. The appeal is reported at 34 Ont. L. R. 335.

The Attorney-General for Ontario was given notice of the proceedings and was represented at the hearings.

1916. July 7, 10, 11, 13, 14. *Sir J. Simon, K.C.*, and *Belcourt, K.C.*, for the appellants. Sect. 93, sub-s. 1, of the British North America Act, 1867, protects all the then existing rights and



privileges of denominational schools, not only rights and privileges as to denominational teaching. The French-Canadian supporters of the separate schools are a "class of persons" within the meaning of the sub-section. Under s. 7 of the Separate Schools Act, 1863, the appellants had in relation to the schools the powers of trustees of common schools. They consequently had, under the Common Schools Act, 1859, power (s. 61) to appoint local superintendents, and (s. 79) to determine the "kind and description" of schools to be established, also powers to manage the schools and to select qualified teachers. The right to determine the "kind and description" of schools includes the right to determine whether English or French should be the language of instruction in any particular school. The rights referred to were vested by law in the trustees at the Union as representatives of a class of persons within s. 93, sub-s. 1, and they are prejudicially affected by regulation 17. The sub-section ensures to the trustees of separate schools the rights which trustees of common schools had in 1867 without any modification which might subsequently take place. Even if the sub-section protects only rights and privileges in relation to religious or denominational teaching, a regulation which alters the language in which a child has hitherto received that teaching is prejudicial thereto. The decisions of the Board in *City of Winnipeg v. Barrett* (1) and *Brophy v. Attorney-General of Manitoba* (2) are not applicable; there was in 1867 no legislative provision for Roman Catholic schools in Manitoba and consequently no existing rights by law. [Reference was also made to *Maher v. Town of Portland* (3); Keith's Responsible Government in the Dominions, vol. 2, pp. 691 et seq.; *McDonald v. Lancaster Separate School Trustees* (4); both the Common Schools Act, 1859, and the Separate Schools Act, 1863, generally; and to the Public Schools Act (R. S. Ont., 1914, c. 266), s. 84 (b).]

*Tilley, K.C.*, for the respondents; *Sir R. Finlay, K.C.*, and *McGregor Young, K.C.*, for the Attorney-General for Ontario. The decisions of the Board referred to for the appellants show that the only rights and privileges protected by s. 93, sub-s. 1, are those

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(1) [1892] A. C. 445.

(2) [1895] A. C. 202.

(3) P. C. (1873) Wheeler's Confederation Law of Canada, p. 362.

(4) (1915) 34 Ont. L. R. 346.

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which any class of persons had (a) by law, (b) at the Union, (c) in relation to denominational schools. It is the right to maintain the denominational character of the schools which is protected, not the trustees' mode of conducting the schools; a power to make regulations is expressly given by s. 26 of the Separate Schools Act, 1863. There was at the Union no legal right or privilege to use the French language in any denominational school. The power to determine the "kind or description" of school relates to the grade of school to be established, that is, to choose from the kind of schools allowed according to the "classification" made under s. 119, sub-s. 4. It cannot have been intended that the language question should be subject to the varying policy of successive boards annually elected. The trustees of separate schools have no power to elect local superintendents; this is made clear by ss. 23, 26, and 27 of the Act of 1863. The French-Canadian supporters are not a class of persons within the meaning of s. 93, sub-s. 1, of the British North America Act; the sub-section connotes a class recognized by legislation. The class here to be considered is the Roman Catholic ratepayers of the province; no prejudice to any right which they had is shown. A right or privilege is something enjoyed independently of the rest of the public: *Fearon v. Mitchell* (1); the regulation, however, applies to both public and separate schools, and clause 2 expressly protects the rights as to religious teaching. The appellants had a right of appeal against the regulation to the Governor-General in Council under s. 93, sub-s. 3, of the British North America Act, 1867.

*Sir J. Simon, K.C.*, in reply. The power of the Department to make regulations under s. 26 of the Act of 1863 is subject to the protection given by s. 93, sub-s. 1.

Nov. 2. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. This appeal raises an important question as to the validity of a Circular of Instructions issued by the Department of Education for the Province of Ontario on August 17, 1913.

The primary schools within the province are for the purposes of this circular separated into two divisions, public schools and separate schools, the latter, with which alone this appeal is concerned, being denominational schools, established, supported, and managed under

certain statutory provisions to which reference will be made. The population of the province is, and has always been, composed both of English- and of French-speaking inhabitants, and each of the two classes of schools is attended by children who speak some one language, some the other, while some, again, have the good fortune to speak both, so that distinction in language does not and cannot be made to follow the distinction in the schools themselves. The circular in some of its clauses deals with all schools, but its heading refers only to English-French schools, which it defines as being those schools, whether separate or public, where French is a language of instruction or communication, which have been marked out by the Minister for inspection as provided in the circular.

The object of the circular is to restrict the use of French in these schools, and to this restriction the appellants, who are the Board of Trustees of the Roman Catholic Separate Schools of the city of Ottawa, assert that they are not obliged to submit. The respondents, who are supporters of the same Roman Catholic schools, desire to maintain the Circular of Instructions in its integrity, and upon the appellants' refusal to abide by its terms the respondents instituted against them the proceedings out of which this appeal has arisen, asking, among other things, a mandatory order enforcing against the appellants obedience to the circular.

The Supreme Court of Ontario granted the injunction that was sought, and their judgment was affirmed by the unanimous opinion of the judges of the Appellate Division of the Supreme Court.

The appellants' defence to the action rests in substance upon the contention that the instructions were, and are, wholly unauthorized and unwarranted and beyond the powers of the Minister of Education because they were contrary to, and in violation of, the British North America Act, 1867.

In order to confer legislative authority upon the instructions an Act of the Province of Ontario (5 Geo. 5, c. 45) has been passed during the litigation declaring that the regulations imposed were duly made and approved under the authority of the Department of Education and became binding according to the terms of their provisions on the appellants and the schools under their control, and containing consequential provisions. It is obvious that the validity of this statute depends upon considerations similar to those involved

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in determining the validity of the instructions, but the statute is the subject of another proceeding (1), and the present appeal is confined to the question whether the Minister of Education had power to issue the circular. The number of schools which are affected by the dispute is considerable, for of 192 Roman Catholic schools under the charge of the appellants 116 have been designated English-French schools.

The material sections in the British North America Act upon which the appellants rely are ss. 91, 92, and 93. Sect. 91 authorizes the Parliament of Canada to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces. Sect. 92 enumerates the classes of subjects in relation to which the Legislatures of the provinces may exclusively make laws, and includes therein generally all matters of a merely local or private nature in the province. Sect. 93 deals specifically with education, and enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to the provisions therein contained. It appears, therefore, that the subject of education is excluded from the powers conferred on the Parliament of Canada, and is placed wholly within the competence of the provincial Legislatures, who again are subject to limitations expressed in four provisions. Provision 1 is in these terms : “ Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union.”

Provision 3 contains an important safeguard, which gives an appeal to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education. Provision 4 provides machinery for making the decision of the Governor-General in Council effective. If a provincial law which seems to the Governor-General in Council requisite for the due execution of the provisions of the section is not made, or any decision of the Governor-General in Council is not duly executed by the proper provincial authority, then and in every such case, and so far only as the circumstances of each case require, the Parliament of

(1) See p. 76, post.



Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under the section. These provisions contain a procedure of great value to the Protestant or Roman Catholic minority in relation to education. They do not affect or diminish whatever remedy the appellants have under provision 1, and cannot operate to give the Legislature of Ontario authority to legislate in matters specially excepted from their authority. Accordingly it would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision 1, and if the regulations which are impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants.

There is no question that the English-French Roman Catholic separate schools in Ottawa are denominational schools to which the provision applies, and it has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practice, instruction, or privilege of a voluntary character which at the date of the passing of the Act might be in operation : *City of Winnipeg v. Barrett*. (1) Further, the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. The appellants and the respondents, therefore, are members of the same class ; but this fact does not affect the appellants' position on their appeal, for their case is that even to the class so determined there were preserved by the statute and vested in them as trustees rights or privileges which include the right of deciding as to the language to be used as a means of instruction ; and the question, therefore, that arises is, What were the rights and privileges that were protected by the Act, and were they invaded by the circular according to its true meaning ?

Now it appears that at the date of the passing of the British North America Act, 1867, a statute was in operation in Upper Canada by which certain legal rights and privileges were conferred on Roman

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Catholics in Upper Canada in respect to separate schools, and so far as the facts of this case are concerned this was the only source from which the rights and privileges could have proceeded.

This Act (1) enabled any number of people, not less than five and being Roman Catholics, to convene a public meeting of persons who desire to establish a separate school for Roman Catholics, and for the election of trustees for the management of such schools; by s. 7 it is enacted that the trustees of such schools should form a body corporate under the statute, should have power to impose, levy, and collect school rates or subscriptions from persons sending children to, or subscribing towards the support of, such schools, and should have "all the powers in respect of separate schools that the trustees of common schools have and possess under the provisions of the Act relating to common schools." A special clause also related to the appointment of teachers, who, before the passing of this statute, had been arbitrarily appointed by boards of trustees, and this power was regulated and restricted by s. 13, which provided that the teachers of the separate schools should be subject to the same examinations and receive their certificate of qualification in the same manner as common school teachers; while s. 26 provided that the schools should be subject to inspection, and should be subject also "to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

In order, therefore, to ascertain the true extent and limit of the powers conferred by this statute it is necessary to see what were the powers enjoyed by trustees of the common schools. These are to be found in another statute of Upper Canada, 22 Vict. c. 64, known as the Common Schools Act, 1859. This statute conferred upon trustees for common schools (now called public schools) certain powers, the most important of which are to be found collected under several heads in s. 79. A mere glance at this section will show that such powers are undoubtedly wide. They include under sub-s. 7 power to acquire school sites and premises, and to do what may seem right for procuring text-books and establishing school libraries, while sub-s. 8 places in the hands of the trustees the determination of "the kind and description of schools to be established," the teachers to be employed, and generally the terms of their employment. These

(1) Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada).

powers are, however, to some extent limited by sub-ss. 15 and 16, the first of which in effect requires that the text-books should be a uniform series of authorized text-books, while the latter compels the trustees to see that all the schools under their charge are conducted according to the authorized regulations.

Counsel for the appellants naturally place great reliance upon these provisions, and in the wider aspect of their argument they contend that "the kind of school" that the trustees are authorized to provide is a school where education is to be given in such language as the trustees think fit. They urge that it was a right or privilege possessed with respect to denominational schools in 1867 in determining the number and kind of schools to say within what limits the French language is to be used; for, according to their contention, "kind of school" means a school where the French language, under the direction of trustees, may be used as a medium of instruction on terms not less favourable than the use of English. Their Lordships are unable to agree with this view. The "kind" of school referred to in sub-s. 8 of s. 79 is, in their opinion, the grade or character of school, for example, "a girls' school," "a boys' school," or "an infants' school," and a "kind" of school, within the meaning of that subsection, is not a school where any special language is in common use.

The schools must be conducted in accordance with the regulations, and their Lordships can find nothing in the statute to take away from the authority that had power to issue regulations the power of directing in what language education is to be given. If, therefore, the trustees of the common schools would be bound to obey a regulation which directed that education should, subject to certain restrictions, be given in either English or French, the trustees of the separate schools would also be bound to obey a regulation of the same character affecting their school, provided that it does not interfere with a right or privilege reserved under the Act of 1867, i.e., a right or privilege attached to denominational teaching.

The objections to the instructions which were urged before their Lordships, however, were not chiefly based on the allegation that they prejudicially affected in any special manner denominational teaching, but on the wider ground. Their Lordships appreciate the affection which the French-speaking residents in Ottawa feel for the French language; but it must not be forgotten that, although a

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majority of the supporters of the English-French separate schools in Ottawa are of French origin, there are other supporters to whom French is not the natural language. This fact has no doubt caused great difficulty in adjusting fairly as between the different inhabitants the natural rivalry as to the languages to be used in the education of the children, and the care with which this difficulty has been considered is evidenced in the terms of a valuable report which is printed in the record and to which their Lordships would direct attention : " As was stated in our former report, while all classes of the French people are not only willing but desirous that their children should learn the English language, they at the same time wish them to retain the use of their own language, and there is no reason why they should not do so. To possess the knowledge of both languages is an advantage to them. And the use of the English language instead of their own, if such a change should ever take place, must be brought about by the operation of the same influences which are making it all over this continent the language of other nationalities as tenacious of their native tongue as the French. It is a change that cannot be forced. To attempt to deprive a people of the use of their native tongue would be as unwise as it would be unjust, even if it were possible. In the British Empire there are people of many languages. The use of these does not affect the loyalty of the people to the Crown, and the English language remains the language of the Empire. The object of these schools is to make better scholars of the rising generation of French children, and to enable them to do better for themselves by teaching them English, while leaving them free to make such use of their own language as they please."

It therefore becomes necessary to examine closely the terms of the circular in order to ascertain the nature and extent of the restrictions it imposes. Unfortunately it is couched in obscure language, and it is not easy to ascertain its true effect. It opens with a definition of English-French schools, and it was argued on behalf of the appellants that even this definition was not within the power of the Department; but there is no weight in this objection, provided that the selected schools are so dealt with as not to impeach any legal right or privilege of the appellants. The second paragraph of the circular is important. The regulations and courses of study

prescribed for the public schools, which are not inconsistent with the provisions of the circular, are applied to the English-French schools, with the following modifications: "The provision for religious instruction and exercises in public schools shall not apply to separate schools, and separate school boards may substitute the Canadian Catholic readers for the Ontario public school readers."

These modifications bring the instructions into agreement with the provisions as to regulations affecting religious instruction in the Common Schools Act and the Separate Schools Act. The only reference to religious instruction to which their Lordships were referred in these statutes is s. 129 of the former statute. This section provides that no persons shall require any pupil to read or study in or from any religious book or join in any exercise of devotion or religion objected to by his or her parents or guardian, and this provision preserves these rights. Indeed the clause, in their Lordships' opinion, indicates that the whole course of religious teaching in the separate schools is outside the operation of the circular, for the circular applies to public schools and separate schools alike and impartially, and if it contained provisions with regard to religious instruction in the public schools, by virtue of this clause those provisions would not apply to the separate schools; throughout the whole of the circular, however, there is nothing whatever to indicate that it is intended to have any application, excepting it may be in the case of public schools, to anything but secular teaching, and it is in this connection that clause 3 must be read. This is the clause which regulates the use of French as the language of instruction and communication, and it is against these provisions that the complaint of the appellants is mainly directed. The clause refers equally to public and separate schools, and directs that modifications shall be made in the course of study in both classes of schools, subject to the direction and approval of the chief inspector. In the case of French-speaking pupils, French, where necessary, may be used as the language of instruction and communication, but not beyond Form I., except on the approval of the chief inspector in the case of pupils beyond Form I. who are unable to speak and understand the English language. There are further provisions for a special course in English for French-speaking pupils, and for French as a subject of study in public and separate schools.

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Mr. Belcourt urged that so to regulate use of the French language in the separate Roman Catholic schools in Ottawa constituted an interference, and is in some way inconsistent with a natural right vested in the French-speaking population ; but unless this right was one of those reserved by the Act of 1867, such interference could not be resisted, and their Lordships have already expressed the view that people joined together by the union of language and not by the ties of faith do not form a class of persons within the meaning of the Act. If the other opinion were adopted, there appears to be no reason why a similar claim should not be made on behalf of the English-speaking parents whose children are being educated in the Roman Catholic separate schools in Ottawa. In this connection it is worthy of notice that the only section in the British North America Act, 1867, which relates to the use of the English and French languages (s. 133) does not relate to education, and is directed to an entirely different subject-matter. It authorizes the use of either the English or French language in debates in the Houses of Parliament in Canada and the Houses of Legislature in Quebec, and by any person, or in any pleading or process in, or issuing from, any Court of Canada, and in and from all or any of the Courts of Quebec. If any inference is to be drawn from this section, it would not be in favour of the contention of the appellants.

Further objections that are taken to the circular depend upon these considerations, that it interferes with the right to manage which the trustees possess, and that it further infringes a right on the part of the trustees to appoint teachers whose certificates are provided by a board of whom the trustees can appoint one.

In their Lordships' view there is no substance in either of these contentions. The right to manage does not involve the right of determining the language to be used in the schools. Indeed, the right to manage must be subject to the regulations under which all the schools must be carried on ; and there is nothing in the Act to negative the view that those regulations might include the provisions to which the appellants object. If, therefore, the regulation as to which the trustees of the common schools were bound to carry on the class of school committed to their charge did in fact, under the Act of 1859, enable directions to be given as to the medium of instruction, the power possessed by the trustees of the separate



schools would have been subject to the same limitation, and the question as to interference with the powers of management does not arise as an independent question.

So far as the teachers are concerned, the words of sub-s. 8 of s. 79 empower the trustees to determine the teacher or teachers ; but this merely means that they are to be determined out of the number who are duly qualified, and it is for the Board of Education to impose what conditions they think fit as to the necessary qualification of such a teacher. Under the statute of 1859 the body for examining and giving certificates of qualification for the teacher was constituted by three members of the Board of Public Instruction, including a local superintendent of the schools ; and it is argued that, under the power of appointing the local superintendent—a power conferred on the trustees—the provisions in the circular, which impose as a necessary condition of qualification of the teachers that they must possess a knowledge of the English language, interfered with the trustees' right in this respect. To accede to this argument would involve the removal of the condition as to the necessary qualification of the teachers from the Board of Education. This might be a serious matter for the cause of education in the Province of Ontario ; but there is no need to consider that the statute compels this view. Even assuming that the provision of s. 96 as to the granting of certificates to teachers might be still revived, yet even then there is nothing to prevent the establishment of special conditions as conditions with which the teachers must comply before any such certificate can be given.

In the result, their Lordships are of opinion that, on the construction of the Acts and documents before them, the regulations impeached were duly made and approved under the authority of the Department of Education and became binding according to the terms of those provisions on the appellants and the schools under their control, and they will humbly advise His Majesty to dismiss this appeal. The appellants will pay the costs.

Solicitors for appellants : *Harrison, Powell & Tulk.*

Solicitors for respondents : *Lawrence Jones & Co.*

Solicitors for the Attorney-General for Ontario : *Freshfields.*

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## [PRIVY COUNCIL.]

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 1916 SEPARATE SCHOOLS FOR OTTAWA . }  
 Nov. 2. AND  
 OTTAWA CORPORATION AND OTHERS . . RESPONDENTS.  
 ON APPEAL FROM THE SUPREME COURT OF ONTARIO,  
 APPELLATE DIVISION.

*Ontario—Separate Schools—Trustees—Act superseding Trustees—Invalidity—Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada), s. 2—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1.*

The appellants were elected under s. 2 of the Separate Schools Act, 1863 (26 Vict. c. 5, Upper Canada), by the supporters of the Roman Catholic separate schools in Ottawa to be the trustees for those schools, and had powers to manage them, subject to regulations. They refused to conduct the schools in accordance with regulations validly made by the Department of Education for the province, and failed to open the schools at the date appointed by law, and to provide or pay qualified teachers. The Legislature of Ontario thereupon passed an Act, 5 Geo. 5, c. 45, which, after re-affirming the regulations and the statutory duties of the appellants, provided by s. 3 that if in the opinion of the Minister of Education the appellant board should fail to comply with any of the provisions of the Act he should have power, with the approval of the Lieutenant-Governor in Council, to appoint a Commission and to vest in it all or any of the powers vested by statute in the board, and to suspend or withdraw all, or any part of, the rights and privileges of the board until he should think proper.

The British North America Act, 1867, s. 93, enacts that for each province the Legislature may exclusively make laws in relation to education, but provides, by sub-s. 1, "nothing in any such laws shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union":—

*Held*, that s. 3 of 5 Geo. 5, c. 45, above mentioned, was ultra vires and invalid under s. 93, sub-s. 1, of the British North America Act, 1867, since it prejudicially affected the right or privilege conferred by the Act of 1863 upon the supporters of the Roman

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\* *Present*: LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

Catholic separate schools in Ottawa (a section of a class of persons within the meaning of the sub-section) to elect trustees for the management of the schools.

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CONSOLIDATED APPEALS from a judgment of the Supreme Court of Ontario, Appellate Division (April 6, 1916), affirming the judgment of Meredith C.J.C.P. at the trial.

The Ottawa Separate Schools Commission was appointed under s. 3 of 5 Geo. 5, c. 45, referred to in the head-note, and under the circumstances therein mentioned.

The appellants brought two actions in the Supreme Court, the first against the respondents the Ottawa Corporation and the Commission for an injunction restraining the corporation from paying to the Commission the school rates which they had collected, and the second against the Quebec Bank and the Commission to restrain the bank from paying over moneys deposited in the names of the appellants. The appellants alleged that s. 3 of 5 Geo. 5, c. 45, was invalid and void under s. 93, sub-s. 1, of the British North America Act, 1867. The Commission by its defence pleaded that the statute was within the competence of the Legislature of Ontario. The respondents the Ottawa Corporation and the Quebec Bank submitted to the order of the Court.

The actions were consolidated and were heard by Meredith C.J.C.P. The learned judge dismissed the actions, and his decision was affirmed by the Appellate Division (Meredith C.J.O. and Garrow, Maclaren, Magee, and Hodgins JJ.A.). The proceedings are reported at 34 Ont. L. R. 624 and 36 Ont. L. R. 485.

The Attorney-General for Ontario received notice of the actions and was represented at the hearings.

1916. July 14, 17. *Sir J. Simon, K.C., Belcourt, K.C., and R. O. B. Lane*, for the appellants. Even if the regulations with which the appellants failed to comply were valid, s. 3 of 5 Geo. 5, c. 45, is ultra vires under s. 93, sub-s. 1, of the British North America Act, 1867. The section deprives the supporters of the Roman Catholic separate schools of their rights under the Separate Schools Act, 1863, to elect trustees, and does so for an indefinite period. Those persons are a class of persons within s. 93, sub-s. 1.

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*Sir R. Finlay, K.C.*, and *McGregor Young, K.C.*, for the Attorney-General for Ontario; *Tilley, K.C.*, for the respondent Commission. There is a large body of Roman Catholic children whose parents desire to obey the regulations, but the appellants have closed the schools. The right or privilege in the Roman Catholic ratepayers is to elect a board to administer the Act. If they persist in electing trustees who fail to carry out valid regulations they refuse to exercise the privilege. The right to maintain separate schools is in abeyance owing to the action of the appellants; the Act complained of merely provides new machinery for the maintenance of the schools. The right of appeal to the Governor-General under s. 93, sub-s. 3, of the British North America Act, 1867, prevents a continuation of the Commission beyond such time as its existence is necessary. Moreover, it is the duty of the Minister under the section complained of to restore the appellants to their functions as soon as they are prepared to administer the law: *Julius v. Bishop of Oxford*. (1)

*Sir J. Simon, K.C.*, in reply. Sect. 93, sub-s. 1, protects rights as to denominational schools, not merely as to denominational teaching. The powers of the trustees may be taken away altogether under the Act complained of; it is not material to the competency of the Act that the powers will be restored if the Minister acts properly or reasonably. [*Brophy v. Attorney-General of Manitoba* (2) was referred to.]

*Hon. M. Macnaughten*, for the respondents the Ottawa Corporation and the Quebec Bank.

Nov. 2. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. The question raised in these consolidated appeals is whether s. 3 of 5 Geo. 5, c. 45 (1915), Ontario, is valid and within the competency of the provincial Legislature. The appellants contend that this section prejudicially affects certain rights and privileges with respect to denominational schools reserved under provision 1 of s. 93 of the British North America Act, 1867.

The preamble of the Act of 1915 recites that an action was then pending in the Supreme Court of Ontario between R. Mackell and others and the appellants. This action has now been finally decided

(1) (1880) 5 App. Cas. 214, 222. (2) [1895] A. C. 202, 214.



adversely to the appellants. Their Lordships see no reason to anticipate that this judgment will not be accepted and obeyed. There is a further recital that the appellants have failed to open the schools under their charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and have threatened at different times to close the said schools and to dismiss the qualified teachers duly engaged for the same. So far as this appeal is concerned the accuracy of these recitals was not questioned by the counsel for the appellants. Sect. 1 of the Act does not come into question in this appeal; s. 2 is a declaration of the duties of the appellants. Sect. 3 is as follows: "If, in the opinion of the Minister of Education, the said board fails to comply with any of the provisions of this Act, he shall have power with the approval of the Lieutenant-Governor in Council—(a) To appoint a Commission of not less than three nor more than seven persons. (b) To vest in and confer upon any Commission so appointed all or any of the powers possessed by the board under statute or otherwise, including the right to deal with and administer the rights, properties, and assets of the board, and all such other powers as he may think proper and expedient to carry out the object and intent of this Act. (c) To suspend or withdraw all or any part of the rights, powers, and privileges of the board, and whenever he may think desirable to restore the whole or any part of the same, and to revest the same in the board. (d) To make such use or disposition of any legislative grant that would be payable to the said board on the warrant of any inspector for the use of the said schools, or any of them, as the Minister may in writing direct."

The acting Minister of Education expressed the opinion that the trustees had failed, and were failing, to comply with the provisions of the Act, and submitted the appointment of a Commission for the approval of the Lieutenant-Governor in Council. The respondent Commission was duly appointed under an Order in Council on July 25, 1915.

The powers conferred on the Minister of Education in sub-ss. (b) and (c) of s. 3 are expressed in very wide terms. At the instance of the Minister, with the approval of the Lieutenant-Governor in Council, all or any part of the rights, powers, and privileges of the appellant board may be suspended or withdrawn without limitation

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in time, and only subject to restoration at the discretion of the Minister. The powers withdrawn from the appellant board may be vested in and conferred upon an appointed Commission, a nominated body, in the selection of which the ratepaying supporters of the Roman Catholic separate schools have no voice. There is no exception to the universality of the extent to which all the rights, powers, and privileges of the appellant board may be suspended or withdrawn and vested in and conferred upon this nominated body. Is this legislation consistent with provision 1 of s. 93 of the British North America Act, 1867? Sect. 93 enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to certain specified provisions. This section has been recently under the consideration of their Lordships in the appeal of the appellant board against R. Mackell and others. (1) The effect of the section and of ss. 91 and 92 is to give an exclusive jurisdiction to the Legislature of each province to make laws in reference to education subject to the specified provisions. The Parliament of Canada has no jurisdiction in relation to education, except under the conditions in provision 4, which are not in question in this appeal. The rights or privileges reserved in provision 1 cannot be prejudicially affected without an Act of the Imperial Legislature.

There is no question that the impeached section of the Act of 1915 does authorize the Minister of Education to suspend or withdraw legal rights and privileges with respect to denominational schools. The case of the respondent commission is that the appellant board does not come within the category of "a class of persons," and that no right or privilege with respect to denominational schools, which the appellant board had by law in the province at the Union, has been prejudicially affected. It was argued that the protection given by provision 1 related to rights or privileges possessed by all the adherents of the Roman Catholic schools in the province, and that the appellant board only represented the minority of a larger class. The status of the appellant board depends on the provisions contained in the Separate Schools Act, 1863. Sect. 2 of that Act confers the right of electing trustees for the management of a separate school for Roman Catholics, not on all the adherents

(1) See ante, p. 62.

of Roman Catholic schools in the province, but on any number of persons, not less than five, being heads of families and freeholders, and householders, resident within any school section of any township or corporate village or town, or within any ward of any city or town, and being Roman Catholics. The right of electing managers is thus conferred on the supporters of a separate school or schools for Roman Catholics within one or other of the designated areas. In the present case the appellants are the elected trustees for the management of Roman Catholic separate schools within the city of Ottawa. They represent the supporters of the Roman Catholic separate schools within the area of the city, and as such elected trustees enjoy the right of management which was conferred under the Separate Schools Act, 1863. Apart therefore from any words of limitation or any implication to be drawn from the context, the appellants represent a section of the class of persons who are within the protection of provision 1. Their Lordships can find neither limiting words nor anything in the context which would imply that they are excluded from the benefit of the provision. They are not the less within the provision that any other board similarly constituted would have similar rights and privileges. They would be entitled to the protection of the provision, though they were the only board of trustees in the province constituted under the Separate Schools Act, 1863. But if the appellants represent people who come within the protection of provision 1, it is difficult to appreciate the argument that no legal right or privilege existing in the province at the Union with respect to denominational schools has been prejudicially affected. It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn in toto for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right

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or privilege under these conditions necessarily operates to the prejudice of the class of persons affected by the withdrawal. Whether or not a different policy might have been preferable, either in the opinion of the provincial Legislature or in that of the Courts, is not a relevant consideration. It was argued that no evidence on behalf of the appellant board had been called to prove that the withdrawal of their rights, powers, and privileges operated to their prejudice. In the opinion of their Lordships no such evidence was necessary.

For the purpose of these appeals it is unnecessary to say more. The decision depends on a question of construction. During the argument the counsel for the respondent Commission pressed on their Lordships the difficulty of providing any adequate alternative in order to ensure the proper education of the children of Roman Catholic parents in the city of Ottawa. Their Lordships realize the great importance of this consideration, and there is no doubt that considerable temporary inconvenience must be involved if the appellant board, as representatives of the supporters of the Roman Catholic separate schools in Ottawa, fail to open the schools under their charge at the time appointed by law, and to provide and pay qualified teachers. It may be pointed out, however, that the decision in this appeal in no way affects the principle of compulsory free primary education in the province established under the Common Schools Act, 1859, and that if the appellant board and their supporters fail to observe the duties incident to the rights and privileges created in their favour the result is that the children of Roman Catholic parents are under obligation to attend the common schools, and thus lose the privileges intended to be reserved in their favour under provision 1 of s. 93 of the British North America Act, 1867. The history of this question is thus accurately summarized in the judgment of Meredith C.J.O.: "The ground upon which was based the claim of the Roman Catholics to separate schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part

of their educational training. This injustice, it was claimed, was greatly aggravated when, by the School Law of 1859, a system of compulsory free primary education in schools supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established."

Their Lordships do not anticipate that the appellants will fail to obey the law now that it has been finally determined. They cannot, however, assent to the proposition that the appellant board are not liable to process if they refuse to perform their statutory obligations, or that in this respect they are in a different position from other boards or bodies of trustees entrusted with the performance of public duties which they fail or decline to perform.

From what has been said it appears that in their Lordships' view the Act as framed is ultra vires, and accordingly liberty will be reserved to the plaintiffs, should occasion rise, to apply to the Supreme Court of Ontario for relief in accordance with this declaration, but their Lordships do not anticipate that it will be necessary for the plaintiffs to avail themselves of this right.

Their Lordships will humbly advise His Majesty that the appeals be allowed with costs to be paid by the respondent Commission here and below, and the respondent commission will pay the costs of the corporation of the city of Ottawa and of the Quebec Bank.

Solicitors for appellants : *Harrison, Powell & Tulk.*

Solicitors for respondents : *Lawrence Jones & Co.*

Solicitors for the Attorney-General for Ontario : *Freshfields.*

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## [PRIVY COUNCIL.]

J. C.\* TORONTO ELECTRIC LIGHT COMPANY, }  
 1916 LIMITED . . . . . } APPELLANTS;

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AND

CORPORATION OF THE CITY OF TORONTO RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,  
 APPELLATE DIVISION.

*Ontario—Electric Light Company—Municipality—Letters Patent—Right to erect Poles—Formal Agreement necessary—Franchise—45 Vict. (Ont.) c. 19, s. 2.*

The appellants were incorporated by letters patent under R. S. Ont., 1877, c. 150, and 45 Vict. (Ont.), c. 19. The letters patent authorized them to lay down and maintain in, upon, and under the streets of Toronto all wires, poles, &c., to enable them to distribute electric light and power. By s. 2 of 45 Vict. (Ont.) c. 19, every company incorporated under that Act may conduct electricity by any means through, under, or along the streets of the municipalities named by its letters patent, but only upon and subject to such agreement in respect thereof as should be made between the company and the municipalities respectively:—

*Held*, (1.) that an agreement to be implied from acts of acquiescence by the respondents was not sufficient to satisfy s. 2 above mentioned, but that the section required a formal agreement as a condition precedent to the appellants' right to enter upon the streets of the city and construct its works; (2.) that the respondents had an absolute right to prohibit the appellants from constructing any works through, under, or along the streets, and not merely a right to regulate by agreement the manner in which the work should be carried out.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (March 15, 1915), reversing the judgment of Middleton J. at the trial.

The action was brought by the appellants in the Supreme Court of Ontario for an injunction restraining the respondents from cutting down, removing, or otherwise interfering with the poles and wires of the appellants upon the streets and other public places in the city of Toronto.

\* *Present*: VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.



The facts of the case, together with the relevant statutes and agreements, appear from the judgment of their Lordships.

The action was tried by Middleton J., who granted the injunction prayed for. The learned judge's judgment is reported at 31 Ont. L. R. 387.

The present respondents appealed to the Appellate Division. That Court (Meredith C.J.O., Magee J.A., and Hodgins J.A., Garrow J.A. dissenting) allowed the appeal and, subject to certain declarations, dismissed the action. The appeal is reported at 33 Ont. L. R. 267.

1916. July 20, 21, 24, 25. *Sir J. Simon, K.C., Hellmuth, K.C., and Anglin, K.C.*, for the appellants.

*Sir R. Finlay, K.C., and Geary, K.C.*, for the respondents.

The arguments sufficiently appear from the judgment of their Lordships. Reference was made to 45 Vict. c. 19 (Ont.), ss. 2, 3, 4; R. S. Ont., 1877, c. 157, ss. 54, 56, 57, 58, 69, 70, 82; R. S. Ont., 1877, c. 1, s. 8, sub-s. 4; and *Toronto Corporation v. Toronto Ry. Co.* (1)

Oct. 23. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, dated March 15, 1915, whereby the judgment of Middleton J. in favour of the appellants, the plaintiffs in the suit, was set aside and it was ordered that, subject to certain declarations therein set out, the action should be dismissed with costs.

The case is not free from difficulty. This is due in a great degree to the fact that some important transactions which took place between the parties to this appeal were not evidenced by nor embodied in formal written instruments.

The appellant company was incorporated by letters patent dated September 20, 1883, under the provisions of the Ontario Joint Stock Companies' Letters Patent Act (R. S. Ont., 1877, c. 150) and of "An Act respecting companies supplying electricity for the purposes of light, heat, and power" (45 Vict. c. 19, Ontario).

The letters patent purported to confer upon the appellant

(1) [1907] A. C. 315.

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company the following amongst other powers, namely :—" To manufacture, produce, use, and sell electric light and power, to erect and construct plant, works, buildings, storehouses, and all other machinery for the production or manufacture of such electric light or power, and to lay down, set up, maintain, renew and remove in and upon and under the streets, squares, and public places of the said city of Toronto all wires, lines, tubes, pipes, poles, posts, and all other apparatus and appliances to enable said company to supply and distribute such electric light and power, to supply electric light or power to such persons, companies, or corporations as may require the same on such terms as may be agreed . . . ."

By s. 2 of 45 Vict. c. 19, above mentioned, it is enacted that "Every company incorporated under this Act may construct, maintain, complete, and operate works for the production, sale, and distribution of electricity for purposes of light, heat, and power, and may conduct the same by any means through, under, and along the streets, highways, and public places of such cities, towns, and other municipalities ; but as to such streets, highways, and public places, only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively, and under and subject to any by-law or by-laws of the councils of the said municipalities, passed in pursuance thereof." By s. 3 it is provided that ss. 50 to 60 and ss. 62 to 85 inclusive of "An Act respecting Joint Stock Companies for supplying cities, towns, and villages with gas and water" (R. S. Ont., 1877, c. 157) should be read as part of the above-mentioned statute (45 Vict. c. 19), the word "electricity" being substituted for the words "gas" or "gas or water" or "gas and water" and the words "wires or conductors" being read after the words "mains and pipes" or "mains or pipes" where these words occur in those sections. On referring to the sections thus incorporated it will be found that compulsory powers are conferred upon the company in respect of only one or possibly two matters. It can undoubtedly under s. 82 enter, if necessary, upon land outside but within ten miles of the city of Toronto and erect works thereon without the consent of the owner. Provision is made for arbitration on such occasions, and under ss. 56, 57, and 58 the company may possibly have compulsory powers where the different parts of a building

belong to different proprietors, or are in the possession of different lessees or tenants, to carry their wires or conduits over the property of one or more of those proprietors or tenants to the property belonging to or in the possession of another, or to break up and cut trenches in passages common to neighbouring proprietors or tenants and to erect works thereon or thereunder, making due satisfaction therefor, but in these two cases alone.

The company, however, is by s. 69 prohibited from taking, using, or injuring any house or other building, or land set apart for a garden, orchard, yard, park, paddock, or such like, or from conveying from the premises of any person water already appropriated and necessary for domestic use, without the consent in writing of the owner or owners first had and obtained. The provision thus incorporated into s. 3 of the Act of 1882, touching the consent of the owners in writing, required as a condition precedent, may afford some clue to the proper construction of the immediately preceding section of the same statute dealing with the streets and highways under the control of municipalities.

The incorporation of a company, such as the appellant company, is, in the Province of Ontario, by no means a matter of course. By the Ontario Joint Stock Companies' Letters Patent Act (R. S. Ont., 1877, c. 150) the Lieutenant-Governor in Council is empowered to grant a charter to any number of persons, not less than five, who shall petition therefor, constituting them, and such others as may become shareholders in the company about to be formed, into a body corporate for the purposes mentioned. Of the granting of the letters patent notice must forthwith be published by the Provincial Secretary in the *Ontario Gazette*. The company so incorporated may, amongst other things, acquire, hold, alienate, and convey real estate subject to the restrictions and conditions imposed by the letters patent, and will also be entitled to all the powers, privileges, and immunities requisite for the carrying on of its undertaking as though it had been incorporated by a special Act of the Legislature embodying all the provisions of that statute.

The appellant company, in exercise of the powers thus conferred upon it, established an extensive system for the distribution of electricity over almost the entire city of Toronto. It supplied current to private customers and to the respondents for the lighting

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of the street lamps. This system was in 1912 a composite one, partly overhead, partly underground, but intercommunicating. Much the larger part was overhead. It then covered 370 street miles, the wires being carried on 15,705 poles erected on the streets and public places of the city. These poles, the greater number of which were owned by the appellant company, the remainder used by it with the permission of their owners, carried 1450 miles of wire. In the great majority of cases each of the poles carried wires supplying current for domestic lighting and power and also wires for street lighting. In a minority of instances the poles and wires were used for one service only, sometimes for street lighting alone, sometimes for domestic service alone.

The underground system at this period consisted of about 350 miles of single conduit laid in twenty-eight to thirty street miles. Many of the circuits of the company are in part overhead and in part underground. At many points the overhead conductors feed the underground, and at many others the process is reversed. The two systems were in 1912 so interlaced, as it was styled, that if the overhead construction were removed the underground, in some instances, would have no connection with the terminal stations or sub-stations of the company or with any source of power. It was not disputed that the cost of constructing underground conduits so far exceeds that of carrying wires overhead upon poles that, having regard to the prices obtained for current, the former system is only commercially possible of adoption in a limited and favoured area in the city of Toronto where customers are both large and numerous. In this state of things the respondents, on February 6, 1912, passed a resolution denying, amongst other things, (1.) the right of the appellant company to lay any underground conduits outside the limits of the city of Toronto as they existed on November 13, 1889, and (2.) its right to construct pole lines within the city save for the purpose of implementing its contract with the respondents themselves for street lighting. They followed this up about the middle of October, 1912, by preventing by force the appellant company from erecting additional poles and wires, and by cutting down and removing certain poles and wire, part of the appellants' overhead system, which had been erected and in actual use for some three years previously. Thereupon the action out of which this



appeal arises was on October 26, 1912, instituted, claiming an injunction restraining the respondents, their servants, agents, and workmen, from cutting down, removing, or otherwise interfering with the poles and wires of the appellant company situate on the street and other public places in the city of Toronto, and also claiming damages and further relief.

On October 26, 1912, an interim injunction in the terms of the claim was granted by Middleton J. It was on November 4, 1912, continued by him till the trial, and on the hearing of the case was by the order of that learned judge, dated May 14, 1914, made perpetual. It was referred to the Master in Ordinary of the Court to ascertain the amount of damages sustained by the appellant company by reason of the acts complained of.

On appeal from this judgment to the Appellate Division of the Supreme Court of Ontario, that Court, Garrow J.A. dissenting, delivered judgment allowing the appeal, and by their order dated March 15, 1915, set aside the judgment and order appealed from, and declared that, save in the cases therein specified, the appellant company had not any right to use any street, highway, or public place within the limits of the city of Toronto, as they then were or might thereafter be constituted, in order to conduct electricity for the purpose of supplying light, heat, or power, nor any right to erect, construct, maintain, complete, or operate in, along, over, or upon any of the said streets, highways, squares, or public places any pole, wire, line, tube, pipe, post, or other apparatus or appliance whatever for the purpose of conducting electricity. The exceptions mentioned are three in number: first, the right to erect poles and wires for the distribution of electricity on the aforesaid streets and public squares and public places secured to the appellant company by the terms of an agreement dated August 30, 1883, entered into by the respondents and one G. D. Morton; second, the rights secured to it by the provisions of certain agreements made during the years 1901 to 1911 inclusive, giving special permission to erect poles and string wires thereon for certain purposes on certain parts of certain streets or public places in the city of Toronto; third, the right under the terms of an agreement made between the appellant company and the respondents, dated November 13, 1889, to construct, lay down, and operate, &c.,

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certain underground wires and conduits in any of the streets, lanes, parks, and public places in the said city for the distribution and supply of electricity, and also the right to distribute the same thereby.

The question for the decision of the Board is in effect which of these two orders, that of Middleton J. or that of the Appellate Division, is right. To determine that question it is necessary, in the first instance, to decide what is the true meaning of the words "only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively" as used in the second section of the statute of 1882 (45 Vict. c. 19). It is admitted by the respondents that this agreement need not be under seal. It is not expressly required even to be in writing. They contend, however,—rightly their Lordships think—that it must be at least a formal agreement as distinguished from mere silent acquiescence or implied consent, and the one thing apparently certain about it is that by the use of the words "only upon" its existence is made a condition precedent, which must be fulfilled by the company before it becomes entitled to enter upon the streets and public places of the city to construct its works.

A provision somewhat analogous to this is to be found in s. 69 of the Act of 1877, incorporated into s. 3 of the Act of 1882, dealing with the owners of private property. It enacts that "nothing contained in this Act shall authorise any such company, or any person acting under the authority of the same, to take, use, or injure for the purposes of the company, any house or other building or any land used or set apart as a garden, orchard, yard, park, paddock, plantation," &c., or "convey from the premises of any person any water already appropriated and necessary for his domestic uses without the consent in writing of the owner or owners thereof first had and obtained." The owner or owners could, of course, attach any conditions they pleased to their consent. It would be strange indeed if s. 2 of the statute should confer upon municipalities, in respect of the streets and highways over which they had authority and control, protection altogether less effective than the succeeding section confers on the owners of the hereditaments thus mentioned, and that silent acquiescence or implied permission should be held sufficient to satisfy s. 2 but insufficient

to satisfy s. 3. By holding that the actual making of a formal agreement is a condition precedent in the first case, just as the obtaining of consent in writing is a condition precedent in the second, the two sections are made to harmonize, and the construction which makes them do so is, in their Lordships' opinion, the true construction of the statute.

It is next necessary to determine what is the character of the rights and powers, the nature and width of the so-called franchise conferred upon the appellant company by the letters patent and the statute of 1882 taken together. Upon this point the parties are at right angles. It is contended on behalf of the corporation that, whatever the nature of the agreement mentioned in s. 2, the corporation has an absolute right to prohibit and prevent the company from constructing, maintaining, or operating any works under, along, or upon the streets, highways, or public places of the city of Toronto for the production, distribution, or sale of electricity for any purpose whatever. It is contended on behalf of the company, on the other hand, that the franchise which it possesses entitles it to do all these and the other things mentioned in the letters patent and this statute, and that the right of the respondents is confined merely to prescribing and regulating the mode and manner in which the franchise is to be exercised and enjoyed. The appellants' counsel insists that, should the respondents absolutely refuse to permit his clients to exercise their so-called franchise, they could, by suit at law, restrain the corporation from so doing, and compel them to confine themselves to their proper function of merely regulating the mode and manner in which the franchise should be exercised and enjoyed. That contention appears to their Lordships to mean, in effect, that the powers conferred upon the company are, in relation to this matter, really compulsory. But it is admitted that the letters patent do not, per se, confer compulsory powers; that they are only enabling in character and merely determine what is intra vires of the company, as would a memorandum of association determine it in this country in the case of a limited liability company under the Companies Act. The language of s. 2 of the Act of 1882 is permissive, not compulsory. It provides that companies incorporated under that Act "may" construct, maintain, complete, and operate works. By the Interpretation Act

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(R. S. Ont., 1877, c. 1) it is provided that in any of the revised statutes of Ontario the word "shall" is to be construed as imperative, the word "may" as permissive, when not inconsistent with the context and object of the particular statute. Again, some of the sections of the Act of 1877, incorporated into s. 3 of the Act of 1882, confer, as has already been pointed out, compulsory powers; but these powers are confined to the matters already mentioned. In no other cases have the company compulsory powers.

Their Lordships cannot, therefore, find anything in the Act of 1882 which would require the word "may" in s. 2 of that statute to receive other than its permissive meaning. The very fact that special provision is made in s. 32 of the Act of 1877 for dispensing with the consent of the owner of land outside the city and referring the matter to arbitration furnishes a strong argument for holding that in all other cases the powers of the company are not compulsory. On the whole their Lordships are of opinion that the letters patent, coupled with the statute of 1882, confer upon the respondents the right to refuse with absolute impunity to permit the appellant company to erect any poles or wires for the production, distribution, sale, &c., of electricity on the streets, highways, or public places in the city of Toronto, and that the contention of the company on this point cannot be sustained.

These conclusions necessitate a brief examination of the dealings of the appellant company and the respondents touching the supply of electricity to the city of Toronto from the year 1883 to the date of the removal of the poles of the former in the year 1912. The agreement of August 30, 1883, mentioned in the order appealed from, was made between the respondents and the promoters of the appellant company, and was adopted by the company after incorporation. It begins with a recital that the promoters had applied for a charter of incorporation of a company under the name of "The Toronto Electric Light Company," but that the same had not yet been granted; that the promoters were the provisional directors to be named in the charter of incorporation when issued; that they were desirous of making all provisions and agreements necessary to enable them to proceed with the erection of poles and wires and all other apparatus for supplying electric light on the streets and public places, and in buildings, public and private, in the city of

Toronto, so that the same might be in operation during the annual exhibition of the Industrial Exhibition Association of Toronto; and that they had applied to the respondents for permission to erect such poles and wires in the public streets and places of the city as might be necessary for those purposes. It then further recited that the respondents had held a meeting, and on August 6 passed a resolution that permission be granted to the Toronto Electric Light Company to erect poles and wires temporarily, for the purpose of testing the electric light, within an area about one square mile in extent, bounded as therein described, upon condition that the poles be erected under the supervision of the city engineer, be not less than 150 feet apart and 30 feet high, and that they and all other appliances and apparatus erected on any of the public streets and places within the described area should be subject to removal after three months' notice from the respondents until otherwise provided by special agreement. It then provides that the permission be given to erect these poles and other apparatus within the area described for the purposes mentioned in, and in conformity with the terms of, the resolution; and that the respondents should allow the Toronto Electric Light Company, when incorporated, to erect, subject to the provisions and conditions therein contained, "upon or in the public streets, squares, and other places within" the aforesaid area, all such poles, wires, and other apparatus as the company might require for the purpose of lighting such streets, squares, public places, and public and other buildings within the same. It lastly provided that that agreement was only an interim agreement until the appellant company should receive its charter of incorporation, and should have duly executed an agreement similar to the present one in all its terms and conditions.

The appellant company having been incorporated on September 23, 1883, in the month of December, 1883, applied to the respondents, through their Fire and Gas Committee, for permission to erect poles within the area of the city for electric lighting purposes, and where necessary to replace those already erected with poles of greater height. That committee made a report recommending that permission should only be granted to place poles on Front Street as far west as Bathurst Street "on the same terms and conditions as the privileges already accorded" to the company.

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The respondents adopted the report with some amendments (not disclosed in the record), and an extract from it containing its substance was on December 13 forwarded by the city clerk to the appellant company with an intimation that the respondents had adopted the report of their committee. Now, stopping there for a moment, it is, in their Lordships' view, clear that the right asserted by the respondents in these early transactions with the appellant company was the absolute right to give or withhold permission for the erection on the streets, squares, and public places in this city of all poles and other appliances for the supply or distribution of electricity for the purposes of lighting the streets or any buildings, public or private, and to have any of these poles when erected removed when they so desired, on giving three months' notice. The appellant company do not appear ever to have challenged this right or asserted, as is now asserted on their behalf, that the right and power of the respondents were confined to the mere regulation of the mode and manner in which the company's franchise should be exercised. The requirement that poles actually erected should be removed without any permission being given to replace them with others seems inconsistent with the limited authority which it is now contended belongs to the respondents, but is quite consistent with the absolute power they claim to possess. On March 8, 1884, less than six months after the incorporation of the appellant company, the respondents advertised for tenders for lighting the streets of the city. On March 28, 1884, the appellant company, in answer to this advertisement, sent to the chairman of the respondents' fire and gas committee a tender for the work mentioned. That tender was on August 30 accepted by the respondents; and on September 6, 1884, the first of a long series of contracts in writing for street lighting was entered into between the appellant company and the respondents.

This contract, after reciting the advertisement for tenders and the sending in and acceptance of that of the respondents, contains a covenant by the appellant company to supply for a term of five years from May 15, 1884, all the electric lights required by the respondents for street lighting purposes and for the lighting of public parks, squares, and other public places in this city. It also provides that the respondents may, on giving six months' notice,



discontinue the use of any lights until their number is reduced to fifty ; may upon a like notice cancel the contract ; and, further, that the appellant company shall, on receiving six months' notice (presumably on the cancellation of the contract), remove, at their own expense, all their wire cables, poles, and other appliances from off the streets and other public places within the limits of the city, and restore these streets and public places to as good a condition as they were in when these poles and appliances were erected ; and, further, that all the street lighting should be done to the satisfaction of the city engineer or such other officer as the respondents should appoint for the purpose. This agreement did not run its course. It was superseded by another agreement of January 14, 1886. It is quite true that the company commenced their commercial lighting before their street lighting. They began to receive revenue from the former in the months of February, 1884, and not from the latter till June, 1884, and the entire revenue obtained from the former in that year amounted to 7323·61 dollars and from the latter 4805·62 dollars. As, however, the agreement of 1884 was not made till September 6, more than half the latter sum and more than two-thirds of the former must have been earned during the currency of the Morton agreement adopted after incorporation. Mr. J. J. Wright, who has been manager of the company for twenty-six years, was examined on this point. He stated that when he first became connected with the company about forty or fifty street lights were in operation ; that for ten to fifteen years the company put up its poles and carried its wires to any customer who wanted electric light ; that in the year 1901, when litigation was threatened between the parties, and the respondents apparently wished to get rid of the appellant company on the ground that it had amalgamated with another company, permission for the erection of poles for private lighting was for the first time required, and that from that time forward it was generally, if not quite invariably, required. All this may well be. In Toronto, as in most other places presumably, electric lighting was looked upon as a boon and those who provided it as public benefactors. Their Lordships are quite convinced that the respondents were perfectly cognizant of the loose practice which prevailed. They knew all about it. That is apparent from the reports of their city engineer from the year 1890 to the

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year 1900. If the implied consent of the respondents during this period to the erection by the appellant company of poles and apparatus to supply private customers was all the latter required to sustain their title to erect and indefinitely maintain them for that purpose, their case might be a strong one; but the former practice was practically abandoned during the eleven years from 1901 till 1912, and contemporaneously with its abandonment written agreements were entered into between the parties in reference to street lighting asserting the right of the corporation to insist on the removal of poles erected for that purpose, most of which poles, according to the finding of Middleton J., served for the purposes of both public and private lighting. It will only be necessary to examine the provisions of three of these agreements at any length. That of January 14, 1886, provided for the supply by the appellant company of electricity for from 100 to 200 lights, as might be required by the respondents for street lighting and for the lighting of public parks, buildings, squares, and other public places in the city of Toronto for a period of four years and six months from July 1, 1886, on the terms set forth in the specification therein mentioned. By it the company were bound to erect and place electric lights when and where they should be, by notice, required so to do, and at all other places in the said city besides the places where the same were then set up. The agreement, unlike that of 1884, does not contain any provision for the removal of the necessary poles and apparatus after termination of the contract. The respondents' counsel contended, however, that this provision is implied, as the permission was only given to erect apparatus for the purposes of the contract, and therefore terminated with the contract.

That agreement was followed by an agreement of a somewhat different character entered into between the same parties on November 13, 1889. It begins by reciting that the company had been engaged in the business of producing and supplying electric light in the city of Toronto on the overhead system, and had plant, poles, and material in use therefor, by which light was then being supplied to the city and to individual citizens thereof; that the company desired to extend their works for the production and supply of electricity for light, heat, and power, and for other purposes, and had applied to the respondents for the *right* to lay down under-

ground wires, conduits, and appliances for the further distribution and supply of electricity throughout the city, and that the corporation had agreed to grant such right. It is to be observed that both the letters patent authorize the laying down and maintaining *under* the streets, squares, and public places of the city of tubes, pipes, and all other apparatus and appliances for the supply and distribution of electric light and power to such persons, companies, and corporations as may require the same; and that s. 2 of the Act of 1882 also empowered the company to construct works for the distribution of electricity for the purposes of light, heat, and power, by any means, *under as well as* through and along the streets, highways, and public places of the city. The agreement proceeds to provide that the respondents thereby granted to the company the right (in addition to their other works and plant in operation for the use of the city and individuals as aforesaid) to construct and lay down and operate underground wires, conduits, and appliances for the distribution and supply of electricity for the purposes already mentioned, with the right to take up, renew, alter, and repair the same. It further provides that the respondents should have the right at the expiration of thirty years from the date of the agreement, on giving one year's previous notice in writing, to purchase all the interests and assets of the appellant company, comprising plant, buildings, and materials used or necessary for carrying on its business; and that in case the respondents should fail to exercise this right of purchase at the expiration of the said period of thirty years they should have the right to exercise it at each succeeding period of twenty years on giving a like notice.

This was the origin of the appellant company's underground system. It was not disputed that an absolute indefeasible right was by this agreement conferred upon the company to maintain, use, and enjoy their underground system until the respondents should exercise their right of purchase, but it was resolutely contended by the appellants that owing to the presence in the agreement of the words in brackets, namely, "in addition to their other work," &c., and to the provisions touching the purchase of all the "interest and assets" of the company, comprising plant, buildings, and material, a right equally absolute and indefeasible was conferred upon them to use, maintain, and enjoy their overhead system for the same

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period. This appears to their Lordships to involve a rather forced construction of the language of the agreement ; but even if this were its true construction, it would, of course, be competent for the parties by a subsequent agreement to rescind the agreement so far as its provisions relate to the overhead system, and to give up the rights claimed to be acquired by it in reference to that system. It is therefore necessary to refer to some of the subsequent agreements to ascertain whether or not this has been done.

Of the many contracts entered into between the parties that of December 10, 1900, may be taken as a specimen. It begins by reciting that the respondents have by advertisement called for tenders for certain electric lighting for the streets and other public places of the city for five years from January 1, 1901, in accordance with certain printed specifications, and that the appellants' tender had been accepted. It then provides that the appellants shall for five years from the above date supply such number of electric lights, not exceeding 1100, as may from time to time during the contract be ordered in writing by the secretary of the fire department or other duly appointed officer, the same to be located on the streets, squares, parks, and lanes of the city as may from time to time be specified by the said secretary, and also shall erect such additional arc electric lights over and above the 1100 when and where required as therein mentioned in other places and streets in the city besides "where the same are then already set up," that all poles (if any) erected or maintained for the purposes of the contract should be located and erected under the supervision of the secretary of the fire department, and that the location of any lights shall be changed from one place to another as directed by this officer. It was not suggested that these 1100 lights did not include the lights supplied by the overhead system existing on November 13, 1889. An altogether new provision is then introduced to the effect that in case the appellant company should amalgamate with or enter into any pooling arrangements with the Consumers' Gas Company the contract should be altogether forfeited. On referring to the specification it will be found that it is provided that at the expiration of the contract all poles and other appliances used by the contractor upon the city streets should, at the option of the respondents, be removed by the contractor, and the road-bed and side-walks



restored as though the poles had not been erected thereon, or should be purchased by the respondents at a price to be agreed upon or determined by arbitration, and if not purchased, that the respondents should, within three months after the expiration of the contract, be at liberty to remove the same at the expense of the contractor, in this case the appellant company. These provisions, while manifestly applying to the overhead system existing on November 13, 1889, as well as the subsequent additions to it, are wholly inconsistent with the notion that by the agreement of that date the appellant company had acquired an absolute indefeasible right to maintain and use the overhead system of supply then existing for a period of thirty years thence ensuing.

If such a right was conferred by that agreement it was by this later agreement of 1900 absolutely abandoned and the right of the respondents again asserted to require the overhead system to be removed if they so pleased. The specification for the succeeding agreement, that of December 29, 1905, touching the supply of electricity for street lighting for five years from January 1, 1906, similarly requires that all the poles used by the contractor shall, at the expiration of the contract, be removed, or, at the option of the respondents, purchased. The absolute right conferred upon the respondents by s. 2 of the Act of 1882 to permit or prohibit the erection or maintenance of an overhead system of wires for electric supply on the streets, squares, and public places of their city has thus been asserted, guarded, and preserved, and in their Lordships' opinion the provision touching the purchase of overhead plant contained in the agreement of November 13, 1889, means no more than this, that the respondents shall be entitled to purchase, when they purchase the underground system, such poles and plant of the overhead system as may be then found lawfully erected on the streets and public places of the city. No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights. It may well be that the appellant company never anticipated that the respondents would insist upon the removal of posts carrying wires, erected with their implied consent but not in pursuance of any formal agreement. With the hardships (if any) or the moralities of the case this Board has no concern. It deals with the legal rights of the

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J. C. parties and those alone, and, having regard solely to them, their  
 1916 Lordships are on the whole of opinion that the judgment  
 TORONTO appealed from was right and should be affirmed and this appeal be  
 ELECTRIC dismissed, and they will humbly advise His Majesty accordingly.  
 LIGHT The appellant company must pay the costs of the appeal.  
 COMPANY, LIMITED  
 v.  
 TORONTO Solicitors for appellants : *Blake & Redden.*  
 CORPORATION. Solicitors for respondents : *Freshfields.*  
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## [PRIVY COUNCIL.]

J. C.\* RAM NARAYAN SINGH (SINCE DECEASED) . APPELLANT ;  
 1916 AND  
 July 28. ADHINDRA NATH MUKERJI AND OTHERS . { RESPONDENTS  
 (PETITIONERS).

*Privy Council—Practice—Appeal allowed—Respondents unrepresented  
 owing to Fraud—Order in Council set aside.*

A respondent to a pending appeal to the Privy Council from Bengal arranged with a person in Calcutta, who falsely represented himself to be agent for a firm of London solicitors, that that firm should conduct the respondents' case, and supplied him with money to remit to the firm for that purpose. The pretended agent gave no instructions and misappropriated the money, in consequence of which the appeal was heard *ex parte*. The appeal was allowed, and on May 23, 1916, an Order in Council was made to that effect. The respondents in June, 1916, first became aware of what had taken place, and in July petitioned that the judgment and Order in Council should be set aside and the appeal restored.

Upon the report and advice of the Judicial Committee, an Order in Council was made in accordance with the petition, subject to terms as to costs

PETITION for the recall of a judgment of the Judicial Committee and an Order in Council, dated respectively May 12, 1916, and May 23, 1916.

The facts appearing from the petition may be shortly stated as follows : On February 11, 1913, the Judicial Committee granted

\* *Present* : LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

special leave to appeal from a decision of the High Court in Bengal. In June, 1915, the first respondent to the appeal learnt that the record in the appeal had been transmitted by the High Court to the Privy Council Office in London. He thereupon arranged with one B. W., who falsely represented that he was agent for a certain firm of London solicitors practising in Privy Council appeals from India, that that firm should conduct the respondents' case, and that they should enter an appearance and retain counsel. The first respondent on July 8, 1915, paid to B. W. Rs.675 to be remitted to London for the purposes of the appeal, and was subsequently informed by him that an appearance had been entered. At a later date B. W. stated that he had forwarded the Rs.675 to London and that further money was required, and the first respondent thereupon paid a further Rs.375 to him. B. W. gave no instructions and misappropriated both sums. No appearance having been entered, the appeal was heard *ex parte*, and by a judgment delivered on May 12, 1916, was allowed. An Order in Council, dated May 23, 1916, was made in accordance with the judgment. Meanwhile, in April, 1916, B. W. was prosecuted in Calcutta for fraud in connection with another matter and absconded. The first respondent thereupon instructed a *vakil* in Calcutta, and on June 6, 1916, learnt what had taken place in reference to the appeal.

The respondents in July, 1916, presented the present petition praying that the judgment and Order in Council might be set aside and the appeal restored. In accordance with the usual practice, the Order in Council had been handed to the solicitors for the successful party and had been transmitted by them to the High Court.

1916. July 28. *Sir R. Finlay, K.C.*, and *Parikh*, for the petitioners.

*De Gruyther, K.C.*, and *Dubé*, for the respondent (appellant).

Their LORDSHIPS reported humbly advising His Majesty that the judgment and Order in Council of May 23, 1916, ought to be set aside and the appeal restored ; that the respondents (petitioners) ought to pay the costs of and incident to the application, in any event ; and that the costs of the rehearing and the costs of the

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J. C.      appellant upon the first hearing ought to be dealt with at the  
 1916      rehearing. An Order in Council was made on August 18, 1916,  
 RAM      confirming the above report. (1)  
 NARAYAN  
 SINGH  
 v  
 ADHINDRA      Solicitor for petitioners : *E. Dalgado*.  
 NATH      Solicitors for respondent (appellant) : *Barrow, Rogers & Nevill*.  
 MUKERJI.

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## [PRIVY COUNCIL.]

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## THE CANTON.

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 Nov. 15.

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*Prize Court — Requisitioning Order — Special Leave to Appeal — Cause for Investigation — Discretion of Judge — Prize Court Rules, Order XXIX., r. 1.*

The Judicial Committee will not grant special leave to appeal from a requisitioning order made by the judge of the Prize Court under the Prize Court Rules, Order xxix., it not being disputed that the goods were urgently required for the prosecution of the war, unless, in their Lordships' opinion, the judge, in determining that there was cause for investigation so that an immediate release to the claimant would be improper, applied the wrong principles or came to an obviously erroneous decision.

Special leave to appeal refused without deciding whether there was an appeal as of right.

Rule in *The Zamora* [1916] 2 A. C. 77 affirmed.

PETITION for special leave to appeal from an order of the President of the Probate, Divorce, and Admiralty Division (in Prize).

On January 1, 1915, a writ was issued by the Procurator-General claiming the condemnation of 150 tons of copper seized on board the steamship *Canton*, as contraband of war or otherwise. The copper

\* *Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

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(1) As to the circumstances in which the Board will allow a rehearing, see *Rajundernarain Rae v. Bijai Govin Sing* (1836) 1 Moo. P. C. 117, and *Venkata Narasimha Appa Row v. Court of Wards* (1886) 11 App. Cas. 660. Judgment upon the rehearing was delivered on November 16, 1916. The order of the High Court was

set aside, and certain questions were remitted to the trial judge for trial. The respondents were ordered to pay the appellant's costs of the first hearing which had been thrown away, and no order was made as to the costs of the rehearing upon which each party was partially successful.

had been shipped from New York for delivery at Stockholm to the petitioner, Hugo Tillquist, a Swedish subject. Copper was made conditional contraband on September 21, 1914, and absolute contraband on October 29, 1914. In June, 1915, the petitioner lodged a claim to the copper on the ground that it was his property, was intended for consumption in Sweden, and that in March, 1915, it had been sold by him to the Government Telegraph Department of Sweden for use in that country. The claim was supported by an affidavit alleging the facts which appear from their Lordships' judgment.

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On November 1, 1916, the petitioner was served with a summons, returnable upon the following day, on an application by the Procurator-General for liberty to requisition the copper forthwith for the use of His Majesty. The application was made under the Prize Court Rules, Order xxix., as made applicable to goods by Order I., r. 2.

The summons was supported by an affidavit stating that the copper was urgently required for use in connection with the defence of the realm, the prosecution of the war, and matters involving national security. There was a further affidavit alleging upon information that the petitioner was agent for a firm of electric cable manufacturers in Germany, and had acted during the war as postal intermediary for iron manufacturers in Berlin.

The President (Sir Samuel Evans) heard the summons in chambers on November 2, 1916. He rejected an application by the petitioner for an adjournment and, after argument, made an order in accordance with the summons. He refused leave to appeal. On the same day the petitioner lodged the present petition to the Judicial Committee, submitting that there was no evidence that the copper had any destination rendering it liable to condemnation as contraband of war, or otherwise, nor any evidence refuting his claim. He prayed for special leave to appeal, and for a stay of the order to requisition, or, if the goods had been removed from the custody of the Admiralty Marshal, for an order for their return to that custody.

Nov. 3. *Leslie Scott, K.C.*, and *Balloch*, for the petitioner.

*Sir Frederick Smith, A.-G.*, and *D. Stephens*, for the Crown.



J. C.           Reference was made to *The Zamora* (1) and the Naval Prize Act,  
1916           1864 (27 & 28 Vict. c. 25), s. 5, s. 55, sub-s. 4.

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Their LORDSHIPS dismissed the petition for reasons to be given subsequently.

Nov. 15. The judgment of their Lordships was delivered by

LORD PARKER of WADDINGTON. This was an application by the owner of a parcel of copper ex the steamship *Canton* for special leave under the prerogative to appeal against an order of the President, whereby the Crown obtained leave to requisition it. The form of the application admitted that there was no appeal of right. Their Lordships refused to advise His Majesty to grant the application for the following reasons: The limits of the Crown's right to requisition goods the subject of proceedings for condemnation in prize were recently laid down by this Board in the case of *The Zamora*. (1) It was there decided that, in order to justify an exercise of the Crown's right, two conditions must be fulfilled. First, the goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. It was not disputed in the present case that the first condition was satisfied, but it was contended that there was no real case for investigation or trial, the facts being such that the goods ought to be immediately released. Their Lordships were of opinion that the question whether there be any case for investigation or trial is one which can be better determined by the judge before whom the proceedings are pending than by this Board. They did not think they could advise an exercise of the prerogative unless they were of opinion that the judge had proceeded on wrong principles, or had come to a conclusion which was obviously erroneous. It appeared that the applicant was before the war an export agent for Swedish, English, French, and German firms engaged in the manufacture of engines and materials for electrical installations. He had at times sold copper to his Swedish principals, but had not theretofore been an importer of copper on his own account. He

(1) [1916] 2 A. C. 77.

found that the business of the several firms for whom he acted as agent was adversely affected by the war, and he gives this as his reason (in their Lordships' opinion a somewhat doubtful reason) for himself commencing to import copper on a large scale. Copper was declared to be conditional contraband on September 21, and absolute contraband on October 29, 1914. The appellant purchased the copper in question in America in October, 1914. He insured it with German underwriters, among others, and procured it to be shipped on board the steamship *Canton* under bills of lading, by which it was made deliverable to the order of himself and his assigns at Stockholm, or as near thereto as the vessel might safely get, the vessel being at liberty to call at any other port. He thus retained a complete power of disposition over the goods. The copper was seized on behalf of His Majesty, and proceedings for condemnation were commenced on January 1, 1915. In March, 1915, the applicant sold the copper to the Telegraph Department of the Swedish Government, delivery to be effected before July 1, 1915. Nevertheless he took no steps (as he might have done under Order v.) to accelerate the trial of the action or to obtain a release on the ground of failure to prosecute it so as to enable him to perform his contract. On the contrary, their Lordships were informed by the Attorney-General, without contradiction, that he failed to comply with requests on the part of the Crown for disclosure of documents, and he still remains in close business communication with German firms. Under these circumstances their Lordships found it impossible to say that there was no reasonable cause for suspicion, or that the goods ought to be released without further investigation.

It may be desirable to add that their Lordships expressed no opinion as to whether the applicant could, under the circumstances, have appealed as of right.

Solicitors for petitioner : *Botterell & Roche.*

Solicitor for the Crown : *Treasury Solicitor.*

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## [PRIVY COUNCIL.]

J. C.\* FALKINER . . . . . APPELLANT;  
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 Dec. 1. WHITTON RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Federal Customs Duty—“Chassis”—“Motor cars, lorries and waggons”—Customs Tariff, 1911 (No. 19 of 1911, Commonwealth), Sched. A, items 161, 380 A, 380 E.

The appellant in 1913 imported into Victoria from Germany a patent road train consisting of eleven vehicles. One vehicle (hereinafter called the driver's car) carried two petrol engines and an electric generator. From this generator power was supplied to electric motors carried by the driver's car and, by cables, to electric motors carried by each of the ten other vehicles; the driver's car and the other vehicles were each driven by this means. The driver's car did not draw the other vehicles. The appellant contended that the vehicles were all “chassis of motor cars, lorries and waggons” within item 380 E of the Customs Tariff, 1911, Sched. A, and that he was accordingly only liable to pay duty at 5 per cent. ad valorem thereon; the respondent (the collector of customs) contended that the driver's car was within item 160 (“locomotives, traction and portable engines”) and consequently dutiable at 25 per cent., and that the other vehicles were dutiable at 40 per cent. under item 380 A as “vehicles not elsewhere included” :—

Held, that on the facts none of the vehicles came within item 380 E, but that they were all “vehicles not elsewhere included” within item 380 A.

Held, further, that as the schedule specified no rate of duty for “motor cars, lorries and waggons,” a complete article of that description was dutiable under item 380 A, and that it should not be taxed under the items relating to its constituent parts; and that this was so although it was imported divided into its constituent parts for convenience of transit merely.

APPEAL by special leave from a judgment of the High Court of Australia (June 11, 1915) reversing the judgment of the Supreme Court of Victoria (December 16, 1914).

The respondent was the collector of customs for the State of Victoria. The appellant in 1913 imported into Victoria from Germany a patent road train, the nature of which is shortly stated

* *Present*: LORD BUCKMASTER L.C., LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

in the head-note and appears fully from the judgment of their Lordships. The appellant was liable to pay customs duty on the imported articles under the (Federal) Customs Act, 1901—1910, the rate of duty having to be ascertained from Sched. A of the Customs Tariff, 1911. The material portions of the schedule appear from the judgment.

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The contentions of the appellant and the respondent respectively as to the items of the schedule applicable were those stated in the head-note. The appellant paid, under protest, the amount of duty claimed, and brought the present action in the Supreme Court of Victoria to recover, under s. 167 of the Customs Act, 1901—1910, the sum of 3917*l.* 8*s.* 9*d.*, which he had paid in excess of the sum for which he was liable if his contention was right.

The action was tried by Hood J., who gave judgment for the appellant.

Upon appeal to the High Court that judgment was reversed by a majority (Isaacs, Higgins, Gavan Duffy, and Rich JJ., Griffith C.J. dissenting). The appeal is reported at 20 C. L. R. 118.

1916. Oct. 24, 26. *A. J. Walter, K.C.*, and *Hunter Gray*, for the appellant.

Colefax, K.C., and *Austen-Cartmell*, for the respondent.

The respective contentions appear from the judgment, the arguments being addressed to the evidence and the nature of the imported articles.

Dec. 1. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the High Court of Australia reversing a judgment of Hood J. in the Supreme Court of Victoria, whereby he ordered that the appellant should recover from the respondent the sum of 3932*l.* 10*s.* 9*d.* and costs.

The action out of which the appeal arises was brought by the appellant under the provisions of s. 167 of the Federal Customs Act, 1901—1910, to recover from the respondent, the collector of customs of the State of Victoria, the sum of 3917*l.* 8*s.* 9*d.*, alleged to be the excess of the import duty levied by the respondent as such officer on certain goods imported by the appellant into Victoria and paid by him under protest.

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It was held by Hood J. and by the High Court of Australia, and, as their Lordships understood, was not contested upon the hearing of this appeal, that under this section the burden of proving that the appellant has been overcharged to any and, if so, to what extent rests upon him. To discharge that burden it has been contended that the goods imported were merely "chassis of motor cars, or motor lorries, or motor waggons" within the meaning of Division XIV., item 380 E, of Sched. A of the Customs Tariff, 1908—1911, and are therefore only liable to an ad valorem duty of 5 per cent. instead of the duty actually levied, which, in every instance save one, was 40 per cent. ad valorem, and in that instance 25 per cent. ad valorem. By s. 2 of the last-mentioned statute, Sched. A of the Customs Tariff, 1908—1911, is amended as set out in the schedule attached to it, and duties are imposed which after December 1, 1911, are to be collected in accordance with said Sched. A as so amended. The said schedule is, moreover, to be taken as specially amended by inserting in its heading the words following: "Whenever any goods are composed of two or more parts, any part though imported by itself may, if so directed by the Minister, be dealt with under the item applicable to complete goods." Sched. A is divided into certain portions, styled divisions, with appropriate headings; but by s. 3, sub-s. 2, of the Customs Tariff Act, 1908, it is expressly enacted that these headings are only introduced for convenience of classification, and are not to affect the interpretation of the Customs Tariff.

Division XIV. is headed "Vehicles." In it are enumerated vehicles of almost every kind and description, such as bicycles, tricycles, perambulators, waggons, buggies, gigs, chassis, hansom cabs, omnibuses, and the like, with the appropriate duty set opposite to each. These duties, however, are under s. 4 of the statute of 1908 to be taken to have been imposed and brought into operation at 4 o'clock on the afternoon of August 8, 1907.

Among the vehicles enumerated under item No. 380 of Division XIV. are, first, motors and lorries ad valorem 35 per cent., with a note "and on and after December 11, 1907, in lieu of the above (a) bodies of motor lorries and waggons, and parts thereof 'n.e.i.' " (meaning "not elsewhere included"), "35 per cent. ad valorem, and (b) chassis for motor waggons and lorries 5 per cent. ad valorem,"

and second, (*k*) motor cars and parts thereof, including tyres when accompanying the vehicles, 35 per cent. ad valorem, with a similar note added "and on and after December 11, 1907, in lieu of (*k*) above (*a*) bodies for motor cars and parts thereof n.e.i. 35 per cent. ad valorem ; (*b*) chassis for motor cars and rubber tyres for one car 5 per cent. ad valorem," with a note "and on and after May 15, 1908, in lieu of this last, chassis for motor cars, but not including rubber tyres, 5 per cent."

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By Division XIV. of the schedule to the Customs Tariff, 1911, the schedule of the statute of 1908 is amended by omitting therefrom the whole of the item No. 380 and substituting therefor a new item bearing the same number. This latter contains the following sub-heads :—(A) "Vehicles n.e.i.," 35 per cent. ad valorem, and after December 21, 1911, 40 per cent. ad valorem. (B) "Vehicle parts n.e.i. including under gear (inclusive of axles n.e.i., springs, and arms), springs, hoods, and bodies, n.e.i." . . . (D) "Motor cars, lorries, and waggons." But immediately opposite these last words no entry is to be found in the columns headed "General Tariff," in which the duties respectively leviable are set forth. The words are merely a heading. The vehicles so described are not taxed under these names as complete machines at all. The things connected with them which are taxed are described as follows :—(1.) "Bodies, including dashboard, footboards, and mudguards, ad valorem," opposite which 35 per cent. is stated in the tariff column. The last-quoted words are immediately followed by the words "and on and after December 15, 1911—(D) Bodies of motor cars, lorries, and waggons," certain duties being named, and then (E) "Chassis of motor cars, lorries, and waggons," 5 per cent.

From this examination it is abundantly clear that at the time the plaintiff's goods were imported complete motor cars were not taxed eo nomine in the schedule of the Act of 1911, or treated under that description as a taxable entity. The powers conferred upon the Minister by the clause already referred to are of a synthetical rather than a disintegrating character. He can deal with a component part imported separately under an item applicable to the complete thing of which it forms a part ; but neither the Minister nor any other authority is empowered to resolve a complete machine or vehicle, such as a motor car, into its constituent parts and levy a

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duty on each or any of the parts. As the complete vehicle, a motor car, is not under that name included in the schedule, it necessarily follows that it must, if it is to be taxed as it stands, be taxed under 380 A as a vehicle n.e.i. The same remark applies to motor lorries and waggons.

It also appears clear from an examination of these enactments that the words "motor cars, waggons, and lorries" are not treated as terms of art, and are not used in them in any technical sense or with any special meaning. They must therefore be interpreted according to their common and ordinary meaning, namely, that which they bear in ordinary colloquial speech. Their Lordships do not propose to attempt to give an exhaustive definition of any one of these terms, but they think that each of them, as commonly understood, connotes certain ideas. The term "motor car," they think, suggests to the mind of any one the idea of a vehicle that is mounted on wheels upon which it runs over the surface of land—a vehicle which is guided and controlled by a person riding upon or in it; is designed and intended to carry one or more persons, and is propelled by power, not supplied from any source external to itself, but which is for the time being stored or generated within it. It is a self-moving vehicle. Its French name, automobile, denotes this quality. The terms "motor waggon" and "motor lorry" connote vehicles of much the same character, save that both are specially designed, intended, and fashioned for the carriage of goods, the latter for the carriage of very heavy goods, and the former for that of goods of a lighter description: each of the three having this characteristic, that it is designed and intended to carry as a load something in addition to its own equipment. It becomes essential, therefore, to ascertain what is the true nature and character of the goods imported in this case. They have been described verbally and pictorially. They were purchased between March 20 and September 13, 1913, by the appellant from W. A. Th. Müller in Germany, and are described in the two invoices thus: "One motor car with two benzine motors each of 100 to 120 h.p. and one double-dynamo chassis with two bogies and iron-shod wheels." It is stated in the invoice, dated September 18, to have been delivered f.o.b. at Hamburg packed in four cases, bearing given numbers as per the vendor's offer of March 20. So that it is quite clear the different

parts composing this machine or vehicle were not imported as separate and independent things having no connection with or relation to each other, but that the whole machine was imported as a completed thing, though for convenience of transit its parts were taken asunder and would require to be assembled at its destination. The article imported was, in their Lordships' view, quite as truly the machine itself as if its parts had never been taken asunder and it had been placed complete upon the ship's deck. It would be as rational, they think, to treat the importation of a fowling-piece in a gun-case as two separate importations, the one of the barrel and the other of the stock, as to treat the chassis of this machine as a subject of import, separate from and unconnected with the rest of the vehicle. The second invoice, dated September 13, 1913, describes the goods with which it deals as "ten electric motor waggons, chassis with steel-shod wheels as per our offer of March 20, 1913." In this, as in the first invoice, the vehicles or machines are first described, and then it is stated that the chassis are furnished with steel-shod wheels. In this case, as in the first, the articles stated to be shipped are the ten vehicles; they are stated to be packed in cases. For that purpose their parts must have been taken asunder and would require to be reassembled; but in this case, as in the other, it is impossible to treat each of the separated parts of each vehicle or machine as a separate and independent subject of import.

In the pamphlet put in evidence these several waggons with the so-called motor car in front are described as the "Müller patent petrol electric railless road train." The waggons have in the pictures all the appearance of ordinary waggons, and the first car, called in the invoice a motor car, is stated to be "conspicuous by its different appearance from the others." It is stated to be the vehicle "carrying the power plant and controlling the gear of the train, and is therefore called the engine car; that mounted on its steel frame are two six-cylinder combustion engines placed one on each end of the car, and developing together 150 to 180 horse-power, if for a 30-ton train, and 200 to 250 horse-power for a 50." The train consisted of a motor car or waggon carrying the driver and ten motor waggons. The driver's car carried two petrol-driven engines of the standard motor car type and a double electric

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generator from which electric power was taken to two electric motors by which the said driver's car was driven. From this generator electric power was also conducted by cables to electric motors carried by each of the ten motor waggons, the waggons being driven along the road each by its own electric motor, and not being drawn by the driver's car. The engine car does not pull any of the others. These latter are moved entirely by electric power supplied from a source external to themselves. They are not, in any proper sense of the term, automobile vehicles, that is, vehicles which at any time store or generate within themselves the power which propels them. Judging from the picture of the engine car, it appears to their Lordships to resemble a traction engine infinitely more closely than an ordinary motor car. It is sworn by its importer to be about eight tons in weight. Its chassis is stated to consist of a straight steel-plate frame resting on two single-axle bogies, each bogie consisting of a pair of wheels 4 feet in diameter and iron shod, with 10 to 12 inch tyres. The train is stated to form one unit, and its great merit is stated to consist in this, that all the wheels of each vehicle become driving wheels; so that "in case of a 50-ton train it has forty-four driving wheels with an average, when fully loaded, of two tons per wheel." Mr. de Fraga, one of the appellant's witnesses, proved that the heaviest motor omnibuses were only five tons weight. But this engine car, though nearly of twice that weight, is not, according to the same witness, built for the carriage of either goods or passengers. It is built merely first to provide power for the propulsion of the car itself and of the other vehicles forming this train, and, second, to carry its mechanics and accessories. Mr. J. G. Coleman, another of the appellant's witnesses, admitted that he had never seen a motor car which had no provision for the carriage of passengers or goods. In ordinary use each vehicle steers the vehicle which immediately follows it, but it is argued that, in case of need, each waggon could be detached and simply steered by the apparatus which it carries. This mode of steering the vehicles other than the engine car is unusual, if not somewhat grotesque. It is thus described by the witness de Fraga: "The steering-gear is a rod out at the back; we did steer them with that rod out at the back; you could steer them at any pace you liked with that; we steered them at five miles an hour over the Benalla

Bridge ; we steered two or three at the time and shifted them ; we did it three or four times ; we steered them at ten miles an hour running behind ; we did that with the bar at the back ; we did it for about 150 yards." Their Lordships think it safe to say that such a mode of steerage would never be suggested to the mind of any one by the use according to the ordinary meaning of language of the words " motor " or " motor waggon " or " motor lorry." In this respect, therefore, the waggons are not automobile and are not motor waggons.

For some reason not apparent the case was fought as if the question was not what was the true character of the vehicles composing this train, but whether the chassis of those vehicles were chassis of motor cars, motor waggons, or motor lorries within the meaning of the above-mentioned schedule, and, in consequence, much evidence was adduced as to the purposes for which these chassis might, with more or less important alterations, be adapted. In their Lordships' view, these considerations are wholly beside the point. The chassis must be treated as designed and imported for the purpose of helping to form the units of this train. And that being so, the main question is, do they as they stand answer the description not merely of chassis for vehicles, but of chassis for " motor cars " or " motor waggons " or " motor lorries " within the meaning of item 380, Division XIV., of the schedule ? The character of the vehicles of which they were respectively to form part is decisive on this point. One of the meanings of the French word chassis is a " frame," and one finds the expression " chassis de fenêtre " (a " window frame ") ; and the evidence in this case establishes that the word " chassis," when applied to a motor car or motor waggon, includes everything but the body placed upon this frame. The nature of the body so imposed may in many cases determine the character of the completed vehicle, though, of course, in most cases the frame of a waggon or lorry is stronger and the engines more powerful, owing to the greater load to be carried, than in the case of an ordinary motor car designed to carry four or five passengers.

Their Lordships are, for the above reasons, clearly of opinion that the so-called engine car was not a motor car or a motor lorry or a motor waggon as those words are commonly understood, and

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that the chassis which formed part of it was not the chassis of a vehicle of any one of these kinds. They are equally of opinion that no one of the ten vehicles composing with the engine car the entire train was a "motor waggon" or a "motor lorry" as those words are commonly understood, mainly because it was not a self-moving vehicle, but derived its motive power entirely from a source external to itself. It necessarily follows, in their view, that the chassis which formed part of each of these vehicles was not the chassis of a motor waggon or of a motor lorry within the meaning of the statute of 1911. They think, therefore, that the contention of the appellants fails. In addition, they are of opinion that, as neither ordinary motor cars in their complete form, nor ordinary motor lorries or waggons in their complete form, nor vehicles such as those composing this train in their complete form, are included in Sched. A of the Act of 1908 as amended in 1911, these vehicles should have been taxed under Division XIV., 380 A, of the schedule to the Act of 1911 as vehicles n.e.i. This was, in fact, done with reference to all but the engine car, and 40 per cent. ad valorem demanded and paid in respect of them. The engine car was taxed under Division VI., item 161, of the same schedule, which deals with "locomotive, traction and portable engines," and a duty of 25 per cent. ad valorem was exacted in respect of it. Their Lordships concur in opinion with the High Court that the engine car was not a locomotive, nor a traction engine, nor a portable engine within the meaning of this item, and that it, like the other vehicles composing this train, should have been made liable to 40 per cent. ad valorem duty. They think, therefore, that the appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellant must pay the costs here and below.

Solicitors for appellant : *Heath & Hamilton.*

Solicitor for respondent : *J. H. Galbraith.*

[IN THE HOUSE OF LORDS.]

H. L. (E.)*

BROOKE APPELLANT ;

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Revenue—Income Tax—Agreement for Annual Payment out of Net Income without Deduction of Income Tax—Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 102, 103.

The plaintiff was formerly the wife of the defendant, but the marriage was dissolved at the instance of the defendant, who was given the custody of the only child of the marriage. Upon an application by the defendant for a settlement the parties agreed the terms of the order. By the settlement the plaintiff charged the income to which she was beneficially entitled under her father's will with the payments thereafter mentioned, and directed the trustees of the will during the joint lives of the plaintiff and the defendant and the child, and whilst the latter should be under the age of twenty-one years, to pay to the defendant an annual sum equal to one fourth of her annual net income (after income tax on the whole income had been paid), or if one fourth part of the said annual net income should be less than 2500*l.* (which event happened), then the clear annual sum of 2500*l.* (without deducting income tax therefrom) out of such annual net income, for the maintenance of himself and the child. Income tax on the whole of the income to which the plaintiff was entitled under her father's will had been deducted at the source or paid by the trustees of the will.

The plaintiff claimed that the provision for payment of the clear annual sum of 2500*l.* to the defendant without deduction of income tax was void under ss. 102 and 103 of the Income Tax Act, 1842, and that she was entitled to deduct income tax therefrom:—

Held, that the settlement took effect according to its terms and was not affected by ss. 102 and 103.

Decision of the Court of Appeal [1916] 2 Ch. 345 affirmed.

APPEAL from an order of the Court of Appeal (Lord Cozens-Hardy M.R., Pickford L.J., and Warrington L.J.) (1) affirming an order of Neville J.

* *Present*: LORD FINLAY L.C., EARL LOREBURN, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

(1) [1916] 2 Ch. 345.

H. L. (E.) The facts are fully stated in the judgment of the Lord Chancellor,
 1917 and the summary in the head-note is sufficient for the purposes of
 BROOKE the argument.

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Jan. 25, 26, 29. *Disturnal*, K.C., and A. M. Latter, for the appellant (the plaintiff). The provision in the settlement for the payment of the clear annual sum of 2500*l.* without deducting income tax therefrom is in direct contravention of ss. 102 and 103 of the Income Tax Act, 1842. It is a contract for payment of a fixed annual sum without deduction of income tax and as such is void under s. 103, and, apart from s. 103, this annuity is payable out of profits and gains brought into charge by virtue of the Act within the meaning of the proviso to s. 102, and the appellant, as the person liable to pay the annuity, is entitled to deduct the income tax therefrom : *Blount v. Blount* (1) ; *Shrewsbury v. Shrewsbury* (2) ; *Attorney-General v. Shield* (3) ; *Floyer v. Bankes* (4) ; *Dalrymple v. Dalrymple* (5) ; *Warren v. Warren* (6) ; *In re Barry's Trusts* (7) ; and see *Attorney-General v. Ashton Gas Co.* (8) ; *Gleadow v. Leetham* (9) ; *Lethbridge v. Thurlow* (10) ; *In re Sharp* (11). The judgment of the Court of Appeal was based upon a misapprehension of the term "profits brought into charge by virtue of this Act," which refers to the whole taxable income whether it has been taxed from the source or not. The intention of the Legislature was that the person who received the benefit of the annuity should bear the burden of the tax, without regard to the intention of the parties : per Blackburn J. in *Festing v. Taylor*. (12) The decision of the Court of Queen's Bench in that case that s. 103 applied to a rent-charge devised by will was reversed by the Exchequer Chamber, but the general observations of Blackburn J. on the intention of the Act remain unaffected. The appellant does not contend that the first part of the clause in the settlement is void, because a fractional part of the whole fund is not an annuity, which in the ordinary meaning of the term denotes a fixed annual

(1) [1916] 1 K. B. 230.

(2) (1906) 22 Times L. R. 598.

(3) (1858) 3 H. & N. 834.

(4) (1863) 32 L. J. (Ch.) 610.

(5) (1902) 39 S. L. R. 348.

(6) (1895) 72 L. T. 628 ; 43
 W. R. 490.

(7) [1906] 1 Ch. 768 ; [1906]

2 Ch. 358.

(8) [1904] 2 Ch. 621.

(9) (1882) 22 Ch. D. 269.

(10) (1851) 15 Beav. 334.

(11) [1906] 1 Ch. 793.

(12) (1862) 3 B. & S. 217, 230.

payment, but to give a fixed annual sum free of income tax is contrary to the statute. This can only be done indirectly by providing that, in addition to the annuity, which is necessarily chargeable with income tax, there should be also raised a further annuity equivalent to the income tax, but of a varying amount according as the income tax rises or falls : *In re Parker-Jervis*. (1) *Frankfort v. Frankfort* (2) is distinguishable, because there the payment of alimony was effected by an order of the Court, and the statute does not apply to orders of the Court, and that distinction is pointed out in *Blount v. Blount*. (3)

Hon. Frank Russell, K.C., and *Bremner*, for the respondent (the defendant). Sect. 103 relates only to such matters as come within the proviso to s. 102, and this case is not within that proviso at all. The only thing dealt with by this deed is the net income, i.e., the income diminished by the amount of the taxation on the whole income. Sect. 102 is confined to the case where the settlor has the right of deduction, but here she has no such right, because the tax has been paid at the source and she is not the person liable. The second provision of the clause in the settlement is to be read in connection with the first. The object of the clause was to divide the fund into three fourths and one fourth, subject to a proviso that in a certain event the one fourth should be an artificial fourth, and the second alternative stands on the same footing as the first. If this payment were made under an order of the Court, admittedly it would not fall within s. 103, and it makes no difference that the order of the Court directs that its purpose shall be carried out by means of an agreement.

A. M. Latter in reply. A contract embodied in a consent order is not the less a contract : *Conolan v. Leyland*. (4)

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The House took time for consideration.

Feb. 26. LORD FINLAY L.C. My Lords, the question on this appeal is whether the provisions of a deed making a settlement of income upon the respondent free of income tax are overridden by ss. 102 and 103 of the Income Tax Act, 1842. In my opinion the

(1) [1898] 2 Ch. 643, 652.

(3) [1916] 1 K. B. 230, 238.

(2) (1845) 4 Notes of Cases, 280.

(4) (1884) 27 Ch. D. 632.

H. L. (E.) deed takes effect according to its terms, and is not affected by these sections.

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The respondent was the husband of the appellant, and there was one child of the marriage, Betty Gillian Price. The marriage was dissolved at the instance of the husband, the decree nisi being dated December 14, 1911, and the decree absolute June 24, 1912. The appellant was entitled to a considerable income under the will of her father, by which the income of one sixth of his estate was settled upon her for life. The income accruing to the appellant for the year ending October 31, 1911, amounted to 9359*l.* net after payment of income tax, and next year was increased by the falling in of an annuity of 3000*l.*, and it was contemplated that it might be further increased. The respondent on March 14, 1912, presented a petition to the Divorce Court asking for an order that a settlement should be made by the appellant for the benefit of the respondent and of the child of the marriage. The registrar reported that the parties had agreed upon the terms of the settlement to be made, and this arrangement was embodied in the deed of June 24, 1912, made between the appellant, therein described as the settlor, and the respondent. The most material clauses of this deed are the first, the second, and the third.

The first clause charges all the income which the settlor was entitled to under her father's will with the payment of the sums mentioned in clause 3.

By the second clause the settlor declares and directs that the trustees should make payment of the sums settled by deed out of the income which would otherwise go to the settlor.

The third clause is as follows : " As from the date of these presents and thenceforth during the period of the joint lives of the settlor and the said Owen Talbot Price and Betty Gillian Price, and whilst the said Betty Gillian Price shall be under the age of twenty-one years, an annual sum equal to one fourth part of the annual net income (after income tax on the whole income has been paid) which shall from time to time during the period aforesaid accrue and would but for these presents be payable to the settlor or her assigns from or in respect of the settlor's settled share or if one fourth part of the said annual net income shall be less than the clear sum of 2500*l.*, then the clear annual sum of 2500*l.* (without deducting

income tax therefrom) out of such annual net income shall be paid to the said Owen Talbot Price, for the maintenance of himself and the said Betty Gillian Price."

On July 27, 1915, an originating summons was taken out by the appellant to have it declared that the provisions of the deed making the 2500*l.* payable without deduction of income tax were void under ss. 102 and 103 of the Income Tax Act, 1842, and that the appellant was entitled to deduct or to direct the trustees of the will to deduct the income tax from the 2500*l.* payable to the respondent.

Neville J. decided in favour of the respondent, holding that income tax could not be deducted, and his decision was affirmed by the Court of Appeal.

The appellant now asks that these judgments should be set aside, and that it should be held that by virtue of ss. 102 and 103 the income tax must be deducted notwithstanding the provisions of the deed. These sections, so far as material, are as follows:—

Sect. 102: "And be it enacted, that upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of [sevenpence], without deduction, according to and under and subject to the provisions by which the duty in the third case of Schedule (D.) may be charged; provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorized to deduct out of such annual payment at the rate of [sevenpence] for every twenty shillings of

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the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable”

Sect. 103: “And be it enacted, that if any person shall refuse to allow any deduction authorized to be made by this Act out of any payment of annual interest of money lent, or other debt bearing annual interest, whether the same be secured by mortgage or otherwise, he shall forfeit for every such offence treble the value of such principal money or debt; and if any person shall refuse to allow any deduction authorized to be made by this Act out of any rent or other annual payment mentioned in the ninth and tenth rules of No. IV. Schedule (A.), or out of any annuity or annual payment mentioned in Schedule (C.) (a) or (E.) (b), or in the next preceding clause, save such annual interest as aforesaid, every such person shall forfeit the sum of fifty pounds; and all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void.”

The income tax on the whole proceeds of the funds in trust for the appellant under the will of her father had been deducted at the source, or paid by the trustees, and no claim has ever been made by the Crown against the respondent for income tax on the payment to him under the deed of settlement.

In my opinion the conclusion arrived at in the Courts below was correct and the statutory provisions relied upon by the appellant have no application to the circumstances of this case.

Sect. 102 begins by charging with income tax all annuities and other annual payments. It then goes on to provide that where the same shall be payable out of profits or gains brought into charge by the Act no assessment shall be made upon the person entitled to the annual payment, but the whole of the profits or gains shall

be charged on the person liable to such annual payment, and that he shall be authorized to deduct out of the annual payment the amount of the duty at the specified rate, and the person entitled to payment shall allow such deduction. Sect. 103 imposes a penalty upon any person who refuses to allow such deduction, and makes void all contracts for any such annual payments without allowing the deduction.

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These sections, therefore, provide machinery for the collection of the tax imposed upon annual payments. It is obviously convenient that where such payments are made out of profits or gains liable to income tax the Crown should receive from the recipient of such profits or gains the whole of the tax and that he should have the right to deduct from the recipients of the annual payments sums representing the tax attributable to their shares respectively.

Sect. 103 avoids any contract providing that such deduction shall not be made. One reason for this provision may be that the amount of the income tax varies from year to year and that the prohibition was deemed convenient in order to ensure that each beneficiary should bear his true proportion of the burden of the tax for the time being. In my opinion s. 102 would not by itself prevent parties from contracting themselves out of the enactment. The prohibition is to be found in s. 103, and would have been unnecessary there if it had already been applied in s. 102.

Questions may arise as to the effect of these sections under very different states of fact. The following possible cases may be put :—

(1.) The parties may have arranged for the allocation as an annuity or annual payment of a certain proportion (say) one fourth of the income arising from profits or gains, subject to the tax, without having deducted the income tax from the gross amount ; or (2.) the sum so allowed may be a fixed sum payable out of the gross amount without having deducted the income tax. (3.) The sum allocated may be a certain proportion (say) one fourth of the net balance of profits and gains after income tax on the whole has been deducted ; or (4.) it may be a fixed sum payable out of the net balance of income after deduction of income tax on the whole.

In cases 1 and 2 the provisions of ss. 102 and 103 for deduction of the income tax from the annual payment, and forbidding any bargain to the contrary, will obviously apply. But in case 3, where

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the parties agree for the allocation in certain proportions of the net balance of profits and gains arrived at after income tax on the whole has been deducted, it is obvious that the provisions of these sections as to deduction on payment can have no application, inasmuch as the deduction has already been made in arriving at the sum to be allocated. In such a case fluctuations in the rate of the income tax necessarily fall upon the recipients in proportion to their shares.

The appellant made no claim in respect of the earlier portion of clause 3 of the deed providing for the payment of an annual sum equal to one fourth part of the annual net income after income tax on the whole had been paid, and for the reason above stated it is clear that no such claim could have been substantiated.

The appellant's attack was directed entirely against the latter portion of clause 3, which provides that if the one fourth settled should be less than 2500*l.*, then in that case the clear annual sum of 2500*l.*, without deducting income tax therefrom, out of such annual income shall be paid.

The appellant's case was that where the parties have agreed, as in the fourth case put above, that fixed sums should be paid out of the net balance of the profits and gains after deduction of the income tax, the recipient of such fixed sums would not be affected by fluctuations in the amount of the income tax and that he would receive these fixed sums without any deduction in respect of any rise on the tax. It was strenuously argued, first, that such an arrangement contravenes the prohibitions of s. 103, and is pro tanto avoided by that section, and, second, that the latter part of clause 3 of the deed providing for the payment of 2500*l.* falls under this category.

In my opinion it is unnecessary to pronounce any judgment on the first of these two propositions, inasmuch as the second proposition has not been established. The appellant's argument was that the provision in question amounts to an infringement of the statutory prohibition against deduction, and that the respondent must submit to a deduction of the income tax upon the whole of the 2500*l.* But the provisions of the clause must be read as a whole. The portion of the clause impugned was obviously meant to secure that the one fourth payable under the earlier part of clause 3 should always be made up to 2500*l.*, but the result of the appellant's contention

would be that if the one fourth falls short of 2500*l.* by any sum, however small, the respondent, instead of having it brought up to 2500*l.* as was intended, must submit to a further deduction which, with income tax at 5*s.* in the pound, would bring the sum receivable down to 1875*l.* Such a result is obviously not merely contrary to the expressed intention of the parties, but preposterous in itself, and can be accepted only if the statute makes it imperative. In my opinion the words of the statute have no application to a case such as the present, in which a certain proportion of the balance remaining after payment of income tax is assigned, coupled with a stipulation that the sum to be received shall not fall below a certain amount.

The substance of the matter, and not merely the form of the words, must be looked at. The provision for a payment of 2500*l.* cannot be divorced from the preceding words providing for payment of a fourth share of the settlor's income to which they are ancillary.

The substance of the deed is that one fourth is assigned to be supplemented if necessary, so as to bring the assigned income up to 2500*l.* No attempt was made on behalf of the appellant to dissect this sum of 2500*l.* and to distinguish between the portion of it representing one fourth of the net income and the supplement required to bring the amount up to 2500*l.* The claim was to the tax upon the whole 2500*l.*, and is in effect that the appellant should be allowed to deduct again what, to a large extent at all events, she has already deducted.

For these reasons, in my opinion, the decision of the Courts below was right, and this appeal should be dismissed with costs.

My Lords, Lord Sumner has seen in writing the opinion which I have just given, and he authorizes me to say to your Lordships that he agrees with it.

EARL LOREBURN. My Lords, I agree. The substance of this disposition is that the trustees are left free to deduct income tax from the annuity, and that the annuity is to vary in amount so as to compensate the annuitant for that deduction. I cannot find in the Act of Parliament the smallest trace of a prohibition against so sensible an arrangement, nor can I imagine why this taxing

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H. L. (E.) Act should go out of its way to worry private people in managing their own affairs without any benefit to the Revenue.

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LORD PARKER OF WADDINGTON. (1) My Lords, I agree. There cannot, I think, be any real doubt as to the true construction of the settlement of June 24, 1912. The life interest of the appellant under her father's will is thereby charged in favour of the respondent with an annual sum equal to one fourth part of the annual income arising therefrom after income tax on the whole has been paid, or alternatively, if such one fourth part shall be less than 2500*l.*, with the clear annual sum of 2500*l.* without deducting income tax. The object is clearly to secure to the respondent a minimum annual payment of 2500*l.* after the claims of the Revenue in respect of income tax have been satisfied. To construe the settlement as conferring in the event contemplated an annuity of 2500*l.*, subject to income tax, would be to turn it into a provision for the relief of the appellant, in case the income tax was raised, instead of a provision intended to secure to the respondent a minimum available income.

The question then arises whether the settlement thus construed contains anything contrary to the provisions of ss. 102 and 103 of the Income Tax Act, 1842. Those sections contemplate (*inter alia*) the case of a trustee in receipt of income for which he is accountable to a beneficiary. The trustee is made primarily liable for the tax, but is given the right to deduct as against the beneficiary the amount paid for tax to the Revenue authorities. Any contract affecting the trustee's right or the beneficiary's obligation in this respect is avoided. Here the trustees of the will are primarily liable for the tax and have a right of deduction against all their beneficiaries, including the respondent. Is there any contract by which the trustees are precluded from making the deduction or the appellant is entitled to payment without deduction? The only contract is the settlement to which the trustees are not parties, and this settlement manifestly proceeds upon the footing that the trustees are to deduct all sums paid to the Revenue in respect of income tax before division of the income between the parties entitled. It follows that the provisions of the two sections are

(1) Read by Lord Shaw of Dunfermline.

entirely unaffected by the settlement. There is nothing in the Act to invalidate the creation of an annuity such that after the deduction of income tax for the time being it will amount to a fixed yearly sum, and this appears to be the effect of the settlement in question.

In my opinion the appeal fails, and should be dismissed with costs.

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LORD WRENBURY. My Lords, I also am of opinion that this appeal fails—indeed I do not hesitate to say that from the first the question has seemed to me unarguable.

I am unable to agree with the Court of Appeal that the charge given by article 1 of the deed is a charge upon the net income dealt with in articles 2 and 3. The deed, I think, creates a charge upon the gross income for payment of a part of or a sum payable out of the net income. But the order which the Court of Appeal made I think is right.

The deed is a contract between the divorced wife and her former husband securing to the latter either (a) a certain fractional part of net income—of a fund that is remaining after the Revenue has already received all that in any case is due for income tax—or (b) a clear sum of 2500*l.* out of that fund in case the one fourth should be less than 2500*l.* The 2500*l.* is not under the Income Tax Acts subject to income tax or to any deduction for income tax; it is part of a larger sum which has already discharged all its liability to income tax. A contractual division of net income does not give rise to a further claim for income tax. There is no income tax upon the 2500*l.* as such. The appellant contends that the deed contains a contract that income tax shall not be deducted and that this is void under s. 103. The first answer is that there is as regards the 2500*l.* no income tax for whose deduction the statute provides and s. 103 has nothing to do with it.

The object and effect of the statute is to make the payer of income a collector of the income tax for the Revenue, empowering him to recoup himself by deduction from the recipient. If there be several recipients he has that right against each of them. But there is nothing whatever in the statute to prevent the recipients making such contract as they like as to the division of the net income among themselves.

H. L. (E.), I put a homely illustration during the argument. If A. has a vessel containing twenty quarts of beer out of which each of twenty persons, B., C., D., &c., is entitled to a quart, but an outside party (the Revenue) is entitled to half a pint out of each quart, the effect of the statute is that the Revenue is entitled to take, not half a pint out of each quart after division, but twenty half-pints out of the aggregate twenty quarts before division, and A. in distribution is entitled to recoup himself by delivery to each of B., C., D., &c., of one half-pint short. This right of recoupment cannot be avoided by contract. But there is nothing to prevent B. from saying to C. you are a thirstier man than I am; I will bear the loss of the half-pint deduction against you as well as that deduction against me. You shall take a full quart and I will go a pint short.

That bargain between B. and C. affects in no way A.'s right to deduct. It is only one by which when A. deducts as against C. the latter is indemnified by B. against the deduction.

There is a second answer to the contention on s. 103. The contract there referred to is a contract between the payer who is entitled to deduct and the payee who is bound to allow the deduction. In the present case the payers are the trustees. They are no parties to the deed of 1912. There is no contract within s. 103, even if the section otherwise applied, which it does not.

The contention that the statute avoids some part of the contract fails.

It remains only to construe the contract: there are two alternatives—namely, (a) one fourth of the net income, and (b) if the one fourth “shall be less than the clear sum of 2500*l.*, then the clear annual sum of 2500*l.* (without deducting income tax therefrom).” I can see only one meaning to the words of the latter alternative. It is this: “If the fourth is less than 2500*l.* you shall have a clear annual sum of 2500*l.*, and by ‘clear’ I mean that you shall suffer no deduction of income tax. You and I will be dividing a sum arising from a larger sum which was subject to income tax. You shall not bear any of that income tax. I will bear it all.”

If the net income is 10,000*l.*, the grantee is to receive under the deed 2500*l.*, being one fourth. If the net income is 9999*l.*, the grantee, according to the appellant's contention, is to receive 1875*l.*, being 2500*l.* less income tax at 5*s.* in the pound. The contract

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says exactly the contrary. He is to receive a clear 2500*l.* without deducting anything for income tax. H. L. (E.)

The appeal, I think, should be dismissed with costs.

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Order of the Court of Appeal affirmed and appeal dismissed with costs to be payable out of the separate property of the appellant.

Lords' Journals, February 26, 1917.

Solicitors for appellant: *Nicholson, Patterson & Freeland.*

Solicitors for respondent: *Capron & Co.*

[IN THE HOUSE OF LORDS.]

MRS. MARGARET THOM OR SIMPSON (PAUPER) · APPELLANT; H. L. (Sc.)*

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Workmen's Compensation — “*Arising out of*” — *Accident due to fall of adjacent Wall—Workmen's Compensation Act, 1906* (6 *Edw.* 7, c. 58), s. 1.

A woman employed by a fish-curer, while working in a shed belonging to her employer, was injured by the fall of a wall which was being built on the property of an adjoining proprietor, with the result that the roof of the shed collapsed and the woman was buried under the wreckage:—

Held, that the accident arose out of her employment within the meaning of the *Workmen's Compensation Act, 1906*.

Dictum of Cozens-Hardy M.R. in *Craske v. Wigan* [1909] 2 K. B. 635, 638, discussed.

Guthrie v. Kinghorn, 1913 S. C. 1155, overruled.

Interlocutor of the Second Division of the Court of Session in Scotland, 1916 S. C. 85, reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (1) (the Lord Justice-Clerk, Lord Dundas,

* *Present*: VISCOUNT HALDANE, LORD KINNEAR, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

H. L. (SC.) Lord Salvesen, and Lord Guthrie) recalling a determination of the sheriff-substitute of Aberdeen under the Workmen's Compensation Act, 1906.

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“ The appellant, who was a fish-worker in the employment of the respondent, was engaged in packing kippered herrings into boxes in a shed belonging to the respondent which had brick walls 7 feet high, a roof of corrugated iron, and was lit by obscured windows in the roof.

“ Between 10 and 11 on the morning of January 26, 1915, when the appellant was so engaged, a brick wall about 20 feet high, and in the course of erection close to the respondent's property, fell by reason of its own instability on the shed, bringing down the roof and part of the wall, and burying the appellant under the wreckage. The appellant received injuries so serious that she was rendered totally incapable for work.

“ The sheriff-substitute found ‘ that the conditions of the appellant's employment obliged her to work where she was, and exposed her to the risk of the said accident,’ and held that the accident to the appellant arose out of and in the course of her employment. The question of law to be determined is whether upon the facts it was competent for the sheriff-substitute to find that the injuries sustained by the appellant were caused by accident arising out of her employment within the meaning of the Workmen's Compensation Act, 1906. The Second Division of the Court of Session have answered this question in the negative, and it is against this decision that the appeal is brought before your Lordships.”

1916. Oct. 30, 31. *Knocker* and *Arthur P. Duffes* (the latter of the Scottish Bar), for the appellant. This is a question of fact for the arbitrator. Assuming that it is a question of law, or of mixed law and fact, the arbitrator has arrived at the right conclusion. The Second Division have proceeded on the view that, the danger arising from the collapse of a wall being a risk to which any member of the public who happened to be in the locality was equally liable, in order to entitle a workman to compensation it must be shown that the risk was accentuated by something he was doing in the

course of his employment. But the cases go further, and establish that if the workman is specially exposed to the risk by reason of the locality of his employment the accident arises out of his employment. As Lord Kinnear, speaking of this class of accident, said in *Millar v. Refuge Assurance Co.* (1), "a risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time." This principle is well illustrated by the two lightning cases—*Andrew v. Failsworth Industrial Society* (2) and *Kelly v. Kerry County Council*. (3) This case falls within the principle of *Blovelt v. Sawyer* (4), *Wicks v. Dowell & Co.* (5), *Morgan v. Owners of S.S. Zenaida* (6), *Davies v. Gillespie* (7), *M'Neice v. Singer Sewing Machine Co.* (8), *Pierce v. Provident Clothing and Supply Co.* (9), *Adamson v. Anderson & Co.* (1905), *Ld.* (10), *Martin v. Lovibond & Sons* (11), *Coyle v. John Watson, Ld.* (12), *Webber v. Wansborough Paper Co.* (13), *Hughes v. Bett* (14), *Nicol v. Young's Paraffin Light and Mineral Oil Co.* (15), and *White v. Avery.* (16) The two frost-bite cases (*Karemaker v. Owners of S.S. Corsican* (17) and *Warner v. Couchman* (18)) are not inconsistent with the appellant's contention, because in each of those cases the county court judge found that there was nothing in the conditions of the employment which specially exposed the workman to the ordinary risk of cold. The dictum of Cozens-Hardy M.R. in *Craske v. Wigan* (19), to the effect that it is not enough for the applicant to say that the accident would not have happened if he had not been engaged in that employment or had not been in that particular place, but that he must go on to say that the accident arose because of something he was doing in the course of his employ-

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- (1) 1912 S. C. 37, 43.
(2) [1904] 2 K. B. 32.
(3) (1908) 42 Ir. L. T. 23; 1
B. W. C. C. 194.
(4) [1904] 1 K. B. 271.
(5) [1905] 2 K. B. 225.
(6) (1909) 2 B. W. C. C. 19.
(7) (1911) 105 L. T. 494; 5
B. W. C. C. 64.
(8) 1911 S. C. 12; 4 B. W. C. C.
351.
(9) [1911] 1 K. B. 997.
(10) 1913 S. C. 1038; 6 B. W. C. C.

874.
(11) [1914] 2 K. B. 227.
(12) [1915] A. C. 1.
(13) [1915] A. C. 51.
(14) 1915 S. C. 150; 8 B. W. C. C.
362.
(15) 1915 S. C. 439; 8 B. W.
C. C. 395.
(16) 1916 S. C. 209; 9 B. W. C. C.
663.
(17) (1911) 4 B. W. C. C. 295.
(18) [1912] A. C. 35.
(19) [1909] 2 K. B. 635, 638.

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ment or because he was exposed by the nature of his employment to some peculiar danger, is not right if he intended thereby to exclude the consideration of the place in which the workman was required by the terms of his employment to be. The Act speaks of "the nature of the employment" in s. 8 in connection with industrial diseases; but that expression is not used in s. 1. The decision in that case can be justified on the ground that at the time of the accident the applicant was sewing for herself. *Guthrie v. Kinghorn* (1), where the fact that an accident befell a man by reason of his employment in a particular place was held to be irrelevant in determining whether the accident arose out of his employment, unless distinguishable, was wrongly decided. Take the case of a fire breaking out on neighbouring premises and spreading. Could it be doubted that the workman would be entitled to compensation? Then is there any distinction in principle between that case and the present? Or suppose the bad condition of the wall was known to the workman, who warned his employer. Would not that be a risk of the employment? But the Act does not depend upon the knowledge or ignorance of the employer. The basis of the Act is insurance, and, as in marine insurance cases, the Court looks to the proximate cause of the accident: *Trim Joint District School Board of Management v. Kelly*. (2) The risk arising from a fire or a falling wall differs from the risk arising from abnormal atmospheric conditions because of its local character, and if a man's employment obliges him to be in that place it becomes a special risk. The employee follows the fortunes of his employer and of his employer's premises. [The following cases were also referred to: *Pomfret v. Lancashire and Yorkshire Ry. Co.* (3), *Plumb v. Cobden Flour Mills Co.* (4), and *Marshall v. Owners of S.S. Wild Rose*. (5)]

Alex. Moncrieff, K.C., and *T. M. Cooper* (both of the Scottish Bar), for the respondent. The words "in the course of" consider the employment as the environment. The words "out of" point to the origin or cause of the accident. It must be an accident resulting from a risk reasonably incident to the employment:

(1) 1913 S. C. 1155.

(3) [1903] 2 K. B. 718.

(2) [1914] A. C. 667, 675-6.

(4) [1914] A. C. 62.

(5) [1910] A. C. 486.

Fitzgerald v. W. G. Clarke & Son (1); *Mitchinson v. Day Brothers*. (2) H. L. (Sc.)
 No added words were required unless the employment were regarded 1917
 as producing the risk. The employee is entitled to compensation THOM
 only if the carrying out of his duties has exposed him to the risk. OR SIMPSON
 Locality is not enough. Here the risk was independent of any v.
 relation between the employer and the employee. SINCLAIR.
 If the accident
 were caused by some feature attaching to the premises which the
 employer invited the workman to enter, then no doubt it would
 arise out of the employment. In that case the stability of the
 premises would be one of the conditions of the employment; but
 there must be a causal nexus between the accident and the employ-
 ment. Here the accident had nothing to do with the premises
 which the employer called upon the workman to occupy. The
 premises were merely the passive medium of transmitting the
 operation of a violence proceeding from without. In the case of
 a risk to which all and sundry are liable the employment must
 introduce some element of special exposure. This was merely a
 risk which occurs to any one who occupies a house in an inhabited
 area. The victims were exposed as citizens of a town, not as par-
 ticular employees. This case is within the principle of *Warner v.*
Couchman (3) and *Kitchenham v. Owners of S.S. Johannesburg*. (4)
 The ratio decidendi of *Craske v. Wigan* (5) is expressly approved
 by this House in *Plumb v. Cobden Flour Mills Co.* (6) It is this:
 Let your employment fix you in a locus, and be you at liberty to
 say the accident would not otherwise have happened, still that is
 not enough; you must trace the accident directly to the employ-
 ment. As regards the cases cited by the appellant, the two means
 of access cases (*Nicol v. Young's Paraffin Light and Mineral Oil*
Co. (7) and *Webber v. Wansborough Paper Co.* (8)) do not apply,
 for in the first case the accident was held to be due to a defect in
 the employer's premises, namely, the want of a fence, and in the
 second the vertical ladder to the quay was held to be specially
 appropriated to the ship so that it was in the same position as the

(1) [1908] 2 K. B. 796, 799.

(5) [1909] 2 K. B. 635.

(2) [1913] 1 K. B. 603, 608.

(6) [1914] A. C. 62.

(3) [1912] A. C. 35.

(7) 1915 S. C. 439; 8 B. W.

(4) [1911] 1 K. B. 523; [1911] C. C. 395.

A. C. 417.

(8) [1915] A. C. 51.

H. L. (Sc.) plank provided by the ship ; all the other cases, except *Hughes v. Bett* (1) and *White v. Avery* (2), which require reconsideration, can be justified on the ground of special exposure. In *Hughes v. Bett* (1) Lord Strathclyde took the view that special exposure in the case of a general risk was unnecessary ; Lord Johnston came to the conclusion on the facts that special exposure was established, but he stated the law correctly. The ruling of Lord Strathclyde is contrary to the whole current of authority and cannot stand. *White v. Avery* (2) carries the matter no further, except that Lord Skerrington adopted the view of Lord Strathclyde ; Lord Mackenzie, on the other hand, dissented, and suggested that Lord Strathclyde's dicta were founded upon a misapprehension of *M'Neice v. Singer Sewing Machine Co.* (3) In *Millar v. Refuge Assurance Co.* (4) the necessity for special exposure was insisted upon.

Knocker replied.

The House took time for consideration.

March 8. VISCOUNT HALDANE. My Lords, Lord Kinneir requests me to say that he concurs in the judgment which I am about to read.

My Lords, in this case the question is whether the appellant, who was employed in packing herrings by the respondent, a fish-curer in Aberdeen, is entitled to recover compensation from him under the Workmen's Compensation Act, 1906, for injury caused by accident. What happened was that a brick wall, about 20 feet high, in course of erection on ground belonging to some one else but contiguous to the curing-shed of the respondent in which the appellant was employed, fell by reason of its instability on the shed. The consequence was that the roof of the shed and part of its wall tumbled in, and the appellant and other workers were buried under fallen material composed mainly of corrugated iron and rafters which belonged to the roof of the shed, and of bricks from the wall on the adjoining property. The sheriff-substitute of Aberdeen decided that the accident to the appellant arose "out

(1) 1915 S. C. 150.

(2) 1916 S. C. 209.

(3) 1911 S. C. 12 ; 4 B. W.

C. C. 351.

(4) 1912 S. C. 37.

of and in the course of the employment " within the meaning of the statute, and awarded compensation for her injuries. But he stated a case so as to raise a question of law for the opinion of the Court. The Second Division, differing from his view of the law, reversed his decision, and hence this appeal.

It will, I think, be convenient in considering the question of law raised, which is one of construction of the words of the Act, to examine it in the first instance apart from authority, and then to see whether the decided cases, looked at in the light so obtained, admit of freedom in interpretation. This is the more expedient because the decided cases, as was established in the course of the able and elaborate arguments which were addressed to your Lordships from both sides of the Bar, are not altogether in harmony. Under these circumstances I turn to the words in the statute on which the question depends. It will be observed that the Legislature has imposed a double condition for the liability of the employer for injury from accident, a condition that the injury must arise not only in the course of the employment but out of it. It is easy in a case like the present to determine the satisfaction of one of these conditions. The appellant was actually employed when the accident occurred, and she was obviously injured by an accident in the course of the employment. But did the accident arise out of the employment? As to the meaning of these words two contentions have been put forward.

According to one of them the language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this and it is said that no further causal connection need be sought.

I think that this interpretation is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field in the farm on which he was employed. Yet he might just as readily have been struck while walking elsewhere off the farm. A further condition seems to be required, the condition that the injury should have arisen, not merely by reason of presence in a

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particular spot at a particular time, but because of some special circumstance attending the employment of the workman there. His duty may have occasioned his being near a tree which attracted the lightning, or being under a roof which for some reason fell in.

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According to the other contention a still fuller and more definite causal relation than this is essential. Unless, it is argued, the accident was due to something the man was doing in the course of his employment or was exposed to as a peculiar danger by the nature of his employment, the conditions required by the statute are not fulfilled. This view of its requirements was adopted in the judgments of the Second Division in the present case, who thought that it derived countenance from expressions used by the Master of the Rolls in *Craske v. Wigan* (1), to which I will refer later. The foundation of the argument is that the mere fact of a man being, by reason of the locality of his employment, in the place where an accident happens to him does not distinguish his case from that of mankind generally if the accident is one, such as a stroke by lightning, which might have happened to him as readily in some other spot as in the one where he was employed. In order that the accident may be truly said to have arisen out of the employment it is argued that the character of the employment must be shown to have actively contributed to its occurrence.

My Lords, there are no doubt many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may therefore be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment.

(1) [1909] 2 K. B. 635.

The question really turns on the character of the causation through the employment which is required by the words "arising out of." Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged.

My Lords, the expression "cause" is almost invariably used in a way which lacks precision. In strict logic the cause cannot be pronounced to be less than the sum of the entire conditions. But in ordinary speech and practice we select some one or more out of what is an infinite number of conditions to be treated as the cause. From the practical standpoint of the man in the street the cause of the setting the house on fire was the striking of a match, while from that of the man of science it was the presence of all the conditions which enabled potential to be converted into kinetic energy. On the other hand, for the Court which tries a question of arson the cause is the intention of the accused and any deed done which has accomplished this intention. What, then, is the special point of view which the Workmen's Compensation Act of 1906 directs us to take in the practical selection of the circumstances which are to determine whether an event has arisen out of the employment which has amounted to injury by accident within the meaning of the Act? I think that the Court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established. For the reasons which I assigned in this House in *Trim Joint District School Board of*

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Management v. Kelly (1), reasons which I abstain from repeating, I am of opinion that the governing purpose of the statute makes it as irrelevant to look beyond the immediate cause of the accident for explanations or for remoter causes as it would be in a case arising on a policy of marine insurance, provided that the circumstances bring the immediate cause within the definition. Where the question is one of the construction of an obligation to insure against accident the law looks to the proxima causa of the accident as decisive and does not look behind it. If, therefore, the language in question were to be construed upon principle and apart from authorities I should be prepared to hold that it was satisfied where, as here, it has been established as a fact that it was arising out of her employment that the appellant was under the roof by the falling in of which she was injured. Behind the fact that the roof fell we cannot go. The limiting words in the Act do not refer to any act of negligence on the part of the employer as to be looked for, but simply to a restriction of the class of accident against which he is to provide insurance. The appellant was injured because she happened at the moment of the accident to be working in the shed where she was employed to work, and I think that, unless authority constrains us to hold the contrary, the Act ought to be construed as signifying that an accident such as this comes within the class against which she is insured. Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment not the less if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof.

I turn now to the authorities to see what bearing they have on the construction of the statute. The first observation I must make is that decided cases afford less guidance than usual on such a question. The reason is that the appellate tribunals have consistently shown a proper reluctance to look beyond findings of

fact by the arbitrator. This has been particularly so in the course of the decisions on the Act in your Lordships' House. *Warner v. Couchman* (1), the frost-bite case, is an excellent illustration of this, and in consequence nothing that was said there is authority on which the appellant here can rely. After examining what has been decided in this House I have come to the conclusion that we are free on the present occasion, so far as decisions in this House are concerned, to construe the statute in the sense I have indicated. I wish particularly to say that in my view there is nothing in *Plumb v. Cobden Flour Mills Co.* (2) which really touches the point here.

But in the Court of Session and in the Court of Appeal in England opinions have occasionally been indicated which apparently militate against this construction, and if there had been anything like a uniform course of decisions to that effect I should naturally have hesitated before disturbing them. However, on examining the authorities I find that they are far from harmonious. I deal with some of the more important.

Guthrie v. Kinghorn (3) was a case in which a carter in charge of a horse and lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building. The Second Division of the Court of Session held that the case was not within the Act because what had happened was not an ordinary risk of the employment. I doubt whether this was right. But the decision, which proceeded on the narrower interpretation of the statute, was followed by the Second Division in the present case. It was thought to have proceeded on a principle believed to have been laid down in *Craske v. Wigan* (4), where the accident was caused by a cockchafer which flew in at an open window, and so frightened a lady's maid, who was doing needlework for herself, that she threw back her hand and injured her eye. It was held that the mere fact that she was in her employer's house was not enough, for it did not really contribute to a risk which was common to humanity. That may well have been the correct interpretation of the facts. What the Master of the Rolls said as to its being necessary to say more than that "the accident would not have happened

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(2) [1914] A. C. 62.

(3) 1913 S. C. 1155.

(4) [1909] 2 K. B. 635, 638.

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if I had not been engaged in that employment or if I had not been in that particular place," is quite true when referred to the facts with which he was dealing. When he adds that the claimant must say that "the accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some particular danger," that is also quite true as a criticism of the kind of claim that was before him. But I am not sure that the exposition of the Act by Buckley L.J. is not unduly abstract, and in consequence apt to mislead in some of its language. He said that the words "out of" point to the origin and cause of the accident, and the words "in the course of" to the time, place, and circumstances under which the accident takes place. In saying this he adopted what he had previously said to the same effect in *Fitzgerald v. W. G. Clarke & Son*. (1) I doubt whether the time, place, and circumstances can properly be so sharply distinguished from other conditions which are described as belonging to the origin and cause as these words suggest. *Mitchinson v. Day Brothers* (2) is, I think, a more doubtful case. There a carter in charge of a horse and van was murderously assaulted, and it was held that the risk of being attacked by a man who was drunk did not arise reasonably out of the employment. In any view the facts differ from those in the present case, but I am not sure that the interpretation of the Act was not too narrow. In *Martin v. Lovibond & Sons* (3) a brewer's drayman who was driving the dray in the course of his employment left his dray to get a glass of beer, and in returning was knocked down by a motor car. His dependants were held entitled to claim. The Court of Appeal held that what had happened arose out of and in the course of his employment. The case shows how far the Courts have sometimes gone in the direction of the wider interpretation of which I have spoken. *Wicks v. Dowell & Co.* (4) was the case of a workman employed in unloading coal from a ship who had to stand by the open hatchway through which the coal was being brought up from the hold. He was seized with an epileptic fit while so engaged, and fell into the hold and was injured. Collins M.R. and the Court of Appeal held that the *causa proxima* of the accident was his necessary nearness to the

(1) [1908] 2 K. B. 796.

(3) [1914] 2 K. B. 227.

(2) [1913] 1 K. B. 603.

(4) [1905] 2 K. B. 225.

open hatchway, and, following the principle of the marine insurance cases to which I have already referred, held that, in interpreting the Act, this, the *causa proxima*, and not the idiopathic condition of the person injured, was to be looked to.

My Lords, I think that the main current of authority in the Court of Appeal in this country does not militate against the view taken by Collins M.R., and in the Court of Session it seems to me that the weight of authority is in its favour and against what has been argued for by the respondent here. In *Millar v. Refugee Assurance Co.* (1) a collector for the company had fallen down a stair which he had to use while seeking to collect a premium. Lord President Dunedin and Lord Kinnear agreed in holding the company liable. The latter said that a risk was specially connected with a man's employment if it was due to the particular place where his employment required him to be at the time. *Adamson v. Anderson & Co.* (2) is a decision of the First Division recognizing this construction, and so, I think, are the decisions in *Hughes v. Bett* (3) and *Nicol v. Young's Paraffin Light and Mineral Oil Co.* (4) *White v. Avery* (5) proceeds on the same principle, and so, as it appears to me, does the earlier case of *M'Neice v. Singer Sewing Machine Co.* (6)

My Lords, it is not necessary to proceed further in the examination of the authorities. For those to which I have referred show that there is no such uniform exposition of this very recent statute as precludes this House from feeling itself free, if it should be so disposed, to give effect to the construction which I am suggesting. For this construction decided cases disclose indeed a great deal of support.

In the result I move your Lordships that the judgment appealed from be reversed and that of the sheriff-substitute restored, and that the appellant should have such costs in this House and in the Courts below as are consistent with her appearance here in forma pauperis.

LORD SHAW OF DUNFERMLINE. (7) My Lords, the question which arises in this case is somewhat narrow, but I have had little

(1) 1912 S. C. 37.

(2) 1913 S. C. 1038.

(3) 1915 S. C. 150.

(4) 1915 S. C. 439.

(5) 1916 S. C. 209.

(6) 1911 S. C. 12.

(7) Read by Lord Atkinson.

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hesitation in agreeing with your Lordships upon it. There have been many cases dealing with the consideration of those words in the Workmen's Compensation Act, namely, "arising out of the employment." The criticism is, of course, correct that those words must be taken to signify something more in the sense of limitation than "in the course of" the employment, and that both of those expressions of condition must be satisfied before the Act can apply. The decided cases are numerous, and the dicta therein cannot always be reconciled; but a further consideration of the language of the statute itself—to which language one must go as the absolute test of liability—has confirmed my view that the decision pronounced by the learned sheriff-substitute was correct.

On January 26, 1915, the appellant, who was then a fish-worker in the employment of the respondent, a fish-curer, was engaged in packing herrings into boxes. The work had to be performed in a brick shed 7 feet high, roofed with corrugated iron and lit by obscure windows in the roof. The appellant was accordingly obliged, as part of the conditions of her service, to be within the shed when engaged in her work and to be there at the time when the accident occurred. The accident itself was caused by reason of the collapse of a brick wall 20 feet high. This was being erected on an adjacent building, and it fell upon the roof of the shed where the appellant was working, bringing down the roof and part of the working shed, so that the appellant and other workers were buried under the wreckage; three of them were killed and six others, of whom the appellant was one, were injured.

The learned sheriff-substitute found that the conditions of the appellant's employment "obliged her to work where she was and exposed her to the risk of said accident." As a statement of fact, this of course cannot be denied; but the respondent's argument before this House is that no liability is imposed under the statute, because such a situation is not covered by the words "arising out of the employment" when these words are properly construed. The main argument relied upon—the argument being successful in the Second Division of the Court of Session—was that the words of the Act "arising out of the employment" should be construed to mean "arising out of the nature of the employment." And a further construction is maintained to be correct, namely,

that the words not only mean "the nature of the employment" in general, but the nature of the injured servant's employment. For myself I cannot so narrow the statutory words, either in the general or in the particular sense.

The test applied by the learned Master of the Rolls, Lord Cozens-Hardy, in the case of *Craske* (1) and referred to by the learned judges as an inviolable rule is that "it is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.'" This dictum has been given effect to in its full extent by the learned judges in the Court below. The Lord Justice-Clerk observes "it seems to me that the accident must have arisen because of the nature of the employment in which the injured person was engaged at the time." Lord Dundas puts the point with much clearness in application to the present case when he says "it seems to me impossible to say that it was because the poor woman was a fish-curer that the accident befell her." And the other learned Lords decide upon the same ground.

My Lords, with much respect to the learned judges, I am unable to agree in such a limitation upon the words of the Act of Parliament. When a miner is engaged to hew coal, and in the course of his work brings down upon himself a mass of superincumbent material, it is plain that such a case would fall within the limited construction just cited. But such a case is comparatively rare. I ask myself what would result under the statute in those infinitely more numerous cases of accident to underground workers, the specific nature of whose employment was, for instance, not in actual excavation, but merely in the haulage of the coal or the lighting or watching of the pit? Accidents arise, not from anything in the nature of the particular miner's work, but possibly from causes, say, subsidence, fires, or escapes of gas, taking their origin it may be miles away, communicating along the strata of the earth and in no way causally connected with the particular workman's job. I think, accordingly, that the statute is not satisfied by asking the question as to whether

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the nature of the employment of the injured person had any causal relation to the accident, because it is clear that in very many instances the accident arose out of the employment as such, apart from the particular nature of the service which the injured workman had to render. When, in fact, the statute uses the words "arising out of the employment" it refers, in the first place at least, not alone to the individual's particular service.

There may be causes of danger arising to all employees, which causes are not confined to the individual situation, but are general and applicable to the employment as a whole. It may be that that employment is underground, with all the risks attached to underground work. It may be in the air or on the sea, with a special exposure to the dangers relative to such elements; or it may be on the surface of the earth, in surroundings which are those of peril. In all such cases it is quite possible to figure injuries by accident in the course of and arising out of the employment, which are totally disconnected with the nature of the employment upon which the workman was generally or for the moment engaged, but which, without any doubt, sprang from the employment in the sense that it was on account of the obligations or conditions thereof, and on that account alone, that he incurred the danger. In short, my view of the statute is that the expression "arising out of the employment" is not confined to the mere "nature of the employment." The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute "arising out of the employment" apply. If the peril which he encountered was not an added peril produced by the workman himself, as in the cases of *Plumb* (1) and *Barnes* (2) in this House, then a case for compensation under the statute appears to arise.

It is said in the present case that the injury by accident arose not because of the nature of the employment, which was packing herrings; and if decisions and dicta, such as those above cited, to the effect that the statutory words "the employment" can only

(1) [1914] A. C. 62.

(2) [1912] A. C. 44.

be satisfied by “the nature of the employment,” this is conclusive. But upon the other hand it is quite plain that it was part of the conditions of the appellant’s labour and part of the obligations which she undertook as a servant of the respondent that she should at the time of the accident occupy this particular place of work which turned out to be a place of special danger. Her service there and not anywhere else brought her into the position of being subjected to this peril. It was not a peril which might fall upon the public at large, such as the severity of the weather, as in *Warner v. Couchman* (1) and *Karemaker v. Owners of S.S. Corsican* (2), but it was a peril attached to the particular location in which by the obligation of service the appellant was placed. In my humble opinion this latter case falls within the Act, upon a sound construction of its terms.

I am glad to be fortified in this view by a large body of decided cases. In *Morgan v. Owners of S.S. Zenaida* (3), where a seaman painting the outside of his ship in Mexican waters, and receiving from his position at work the force both of the direct and the reflected rays of the sun, underwent sunstroke, he was held entitled to recover under the Act. In *Davies v. Gillespie* (4)—also a case of sunstroke—liability attached because the workman was placed by the conditions of his work within a zone of special danger, namely, for some hours on a blackened steel deck under the blazing sun of Hayti. In *Millar v. Refuge Assurance Co.* (5) an assurance company’s collector, engaged in collecting premiums, was injured in a stair to which he had by the obligations of his service to go; in *M’Neice v. Singer Sewing Machine Co.* (6) an accident overtook a salesman who was cycling in the course of his duty in a public street. In both of these cases liability was held to attach to the employer, and for the same reason, namely, that it was part of the obligations of the service that the workman was placed within the zone of special danger. I venture to give my particular adhesion to the opinion delivered by my noble and learned friend Lord Kinnear in the former of these cases. In *Andrew v. Failsworth Industrial*

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(1) [1912] A. C. 35.

(2) 4 B. W. C. C. 295.

(3) 2 B. W. C. C. 19.

(4) 105 L. T. 494; 5 B. W. C. C. 64.

(5) 1912 S. C. 37.

(6) 1911 S. C. 12.

H. L. (SC.) *Society* (1) (a lightning case) the position in which the man was doing the work and the place he had necessarily to occupy were a position and a place of special danger, and so the Act was held to apply. In *Pierce v. Provident Clothing and Supply Co.* (2)—a street accident to a collector on a bicycle—the Scotch case of *M'Neice* (3), just referred to, was followed. In *Coyle v. John Watson, Ltd.* (4) this House, reversing the Second Division of the Court of Session, held that, a workman having been by the conditions of his service placed in a position of danger from extreme chill, causing pneumonia and death, there was liability under the Act. In *Martin v. Lovibond & Sons* (5) the same decision was given as in the analogous street cases of *M'Neice* (3) and *Pierce*. (2)

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My Lords, the cases above cited, nine in number, are in truth all what might be termed "location" cases, and, although there is much variety of expression by the learned judges, I think that they form a body of authority in support of the construction of the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations, or incidents of the employment by which the workman was brought within the zone of special danger that injury by accident was pronounced to have arisen out of the employment.

In conclusion, my Lords, I desire to say that the case of *Guthrie* (6) is inconsistent with these decisions and with the present judgment and cannot be supported.

LORD PARMOOR (7) (after stating the facts). My Lords, apart from authority it appears to me to be reasonably clear, and in accordance with the ordinary natural meaning of the language of the statute to hold, that if the conditions of his employment oblige a workman to work in a particular building or position which exposes him at the time and on the occasion of the accident to the injury for which compensation is claimed, then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed, such accident arises out of his employ-

(1) [1904] 2 K. B. 32.

(2) [1911] 1 K. B. 997.

(3) 1911 S. C. 12.

(4) [1915] A. C. 1.

(5) [1914] 2 K. B. 227.

(6) 1913 S. C. 1155.

(7) Read by Lord Dunedin.

ment, as incident, not to the character of the work, but to the dangers and risks of the particular building or position in which by the conditions of his employment he is obliged to work. The Workmen's Compensation Act connotes no distinction between such dangers and risks and dangers and risks incident to the plant required in the employment, or to the particular machine at which the workman may be engaged at the time of the accident. In either case the workman is subjected to an accident which arises out of his employment. Mr. Moncrieff, in his able argument, suggested a distinction between inherent defects in a building and wreckage caused by the outside carelessness of some third party. This consideration appears to me to have no weight under the insurance principle of the Workmen's Compensation Act, in which compensation is not dependent in any way on the conduct or negligence of the employer. It was further argued that all mankind were subject to the risk of a falling wall in the proximity of new buildings, and that this consideration negatived the suggestion that the accident arose out of the employment, although the sheriff-substitute had found that the appellant was obliged, under the conditions of her employment, to work in this particular shed, which was wrecked by the fall of an adjoining wall.

I am unable to assent to this argument. The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment. Any stranger walking along a road in a mine may be exposed to the risk of an accidental fall of coal, but this does not affect the claim of a miner who in the course of his duty, or to obtain access to his work, is unfortunately injured by such fall. It is, no doubt, not sufficient merely to allege that the accident could not have happened if the appellant had not been in the particular shed, but this is not the case made on behalf of the respondent, and would be inconsistent with the findings of fact by the sheriff-substitute.

A large number of cases were cited to their Lordships during the argument, but it is not necessary to refer to them further after the exhaustive review in the opinion of the noble lord Viscount Haldane, and I propose only to refer to the cases on which the Lord Justice-Clerk relies in support of his opinion.

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H. L. (SC.) In *Craske v. Wigan* (1) it was held that it was not enough for the
 1917 applicant to say "The accident would not have happened if I
 THOM had not been engaged in that employment or if I had not been in
 OR SIMPSON that particular place." I do not think that the present appeal
 v. necessitates any departure from this principle. The Master of the
 SINCLAIR. Rolls then adds the applicant must go further and say "The
 Lord Parmoor. accident arose because of something I was doing in the course of
 my employment, or because I was exposed by the nature of my
 employment to some peculiar danger." The words "nature of
 the employment" do not occur in this part of the statute, but
 it is unnecessary to raise any matter of mere verbal criticism. In
 my opinion, if the conditions of the workman's employment oblige
 him to work in a particular building and thereby expose him to
 the risk of the accident which has happened, this may be described
 as a peculiar danger to which from the nature of the employment
 the workman is exposed. I think, however, that it is preferable
 to adopt the actual words of the statute in testing their applicability
 to the facts of a particular case.

In the case of *Plumb v. Cobden Flour Mills Co.* (2), decided in
 this House, Lord Dunedin says, "A risk is not incidental to the
 employment when either it is not due to the nature of the employ-
 ment or when it is an added peril due to the conduct of the servant
 himself," and adds, "Illustrations of the first proposition will be
 found in all the cases where the risk has been found to be a risk
 common to all mankind, and not accentuated by the incidents of
 the employment." A risk may be accentuated by the incidents
 of the employment when the conditions of the employment oblige
 the work to be carried on in a particular building which exposes
 the workman to the risk of the accident which in fact has occurred.
 An example of the application of this principle is found in the case
 of *Andrew v. Failsworth Industrial Society* (3), which is approved
 in the opinion of Lord Dunedin.

Collins M.R. says: "Though it" (the accident) "may not be con-
 nected with, or have any relation to, the work the man was doing,
 yet, if in point of fact the position in which the man was doing the
 work, and the place he must necessarily occupy while doing the

(1) [1909] 2 K. B. 635, 638.

(2) [1914] A. C. 62, 68.

(3) [1904] 2 K. B. 32, 34.

work are a position and a place of danger which caused the accident, it may fairly be said that it arose out of the employment, not because of the work, but because of the position." Cf. *Martin v. Lovibond & Sons*. (1) The only other case decided in this House to which the Lord Justice-Clerk refers is *Trim Joint District School Board of Management v. Kelly* (2), but this is not a case which can be quoted to support the contention of the respondent.

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My Lords, in my opinion, the appeal should be allowed with costs.

Interlocutor of the Second Division of the Court of Session in Scotland reversed and interlocutor of the sheriff-substitute restored. The respondent to pay the costs of the action in the Court of Session and also the costs of the appeal to this House, such last-mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, March 8, 1917.

Agents for appellant: *John Cuthbert, for T. M. Pole, solicitor, Leith, Edinburgh.*

Agents for respondent: *R. S. Taylor, Son & Humbert, for Macpherson & Mackay, S.S.C., Edinburgh.*

(1) [1914] 2 K. B. 227.

(2) [1914] A. C. 667.

[IN THE HOUSE OF LORDS.]

H. L. (E.)* GREAT WESTERN RAILWAY COMPANY . APPELLANTS ;

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AND

March 13. WILLS RESPONDENT.

Railway—Carriage of Goods—Owner's Risk Consignment Note—Construction—"Non-delivery of any consignment."

A consignment of carcases of frozen mutton was delivered to a railway company for carriage on their railway at a reduced rate upon the terms of a contract signed by the owner, which provided that the company should be relieved from "all liability for loss, damage, misdelivery, delay or detention," unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of "non-delivery of any package or consignment fully and properly addressed," and that "no claim in respect of goods for loss or damage during the transit" should be allowed unless made within three days after delivery of the goods in respect of which the claim was made, or "in the case of non-delivery of any package or consignment," within fourteen days after despatch.

When the consignment arrived at its destination a few of the carcases were missing, and the owner made a claim against the company within fourteen days after the despatch of the consignment:—

Held (by Viscount Haldane, Lord Kinnear, and Lord Parmoor; Lord Shaw of Dunfermline dissenting), that non-delivery of a consignment meant non-delivery of the consignment as a whole, as contrasted with short delivery, and that the claim failed. Earl Loreburn was of opinion that the question whether shortage amounted to a non-delivery of the consignment was a question of fact in each case, and that in the special circumstances of the case, in the absence of agreement between the parties, there ought to be a new trial.

Decision of the Court of Appeal [1915] 1 K. B. 199 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court (2), which affirmed a judgment of the judge of the Bristol County Court.

The respondent, who was a meat salesman, brought an action against the appellants, the Great Western Railway Company, in

* *Present*: EARL LOREBURN, VISCOUNT HALDANE, LORD KINNEAR, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) [1915] 1 K. B. 199.

(2) [1914] 1 K. B. 263.

the county court, claiming damages for the non-delivery of certain carcasses of frozen meat which formed parts of three consignments delivered by him to the appellants for carriage from Avonmouth to Lawrence Hill Station, Bristol, to be delivered thence to his order.

In each case the respondent had signed a consignment note, headed "Consignment Note for Goods to be carried at Reduced Rates at Owner's Risk," in the following terms :—

"Receive and forward the undermentioned goods, to be carried at the reduced rate, below the company's ordinary rate, in consideration whereof I agree to relieve the Great Western Railway Company, and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention (including detention of traders' trucks), except upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants. But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery (that is to say) :—

"1. Non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire.

"2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand provided the pilferage is pointed out to a servant of the company on or before delivery.

"3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within twenty-eight days after despatch.

"Provided that the company shall not be liable in the said cases of non-delivery, pilferage, or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

Certain general conditions were indorsed on the consignment note, of which the third was as follows :—

"No claim in respect of goods, for loss or damage during the transit for which the company may be liable, will be allowed unless the same be made in writing within three days after delivery of the goods in respect of which the claim is made, such delivery to be

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considered complete at the termination of the transit, as specified in condition 6, or in the case of non-delivery of any package or consignment within fourteen days after despatch."

The consignments were checked and delivered on behalf of the respondent by the servants of the Bristol Docks Committee from their cold stores at Avonmouth to the appellants, who by their servants checked the carcasses and gave receipts for the same and received them into the appellants' refrigerator vans. These vans were hauled by an engine and over rails belonging to the Bristol Docks Committee to the exchange sidings, and were there hauled by an engine belonging to the appellants to the Lawrence Hill Station at Bristol.

Each carcase of the three consignments was wrapped in a canvas cover with marks corresponding to marks and entries in the consignment notes and upon the receipts. No package of any other sort or description or for any other destination was placed in the refrigerator vans. To each van was attached a label with an address upon it corresponding to entries on the consignment notes. The labels were addressed and affixed to the vans by the appellants' servants at Avonmouth.

The three consignments were despatched from Avonmouth on May 17, July 22, and October 23, 1912.

The appellants failed to deliver to the respondent's order four carcasses from the first consignment, one from the second, and seven from the third. The total shortage was twelve carcasses out of 752.

In the case of the first two consignments the respondent sent to the appellants claims in writing in respect of the missing carcasses within fourteen days after the date of despatch but more than three days after the delivery of the balance of the consignments, and in the case of the third consignment the claim in writing was made within three days of the delivery of the balance of that consignment.

The learned county court judge found that the consignments were fully and properly addressed; that they were in the custody of the appellants as from the moment when the appellants' servants at Avonmouth gave receipts for them; and that the shortage was appreciable; and he held that non-delivery of an appreciable part of a consignment was non-delivery of the consignment, and that the respondent had fourteen days after the despatch of the consign-

ment within which to make his claim. He was further of opinion that the appellants had failed to prove that the loss was not caused by negligence or misconduct on the part of their servants. He therefore gave judgment for the respondent for 10*l.* 8*s.* 9*d.* the value of the missing earcases. This decision was affirmed, first, by the Divisional Court (Bray J. and Lush J.) (who granted leave to appeal upon condition that the appellants paid all costs on both sides in any event, both in the Court of Appeal and in the House of Lords), and, secondly, by the Court of Appeal by a majority (Buckley L.J. and Pickford L.J., Phillimore L.J. dissenting).

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1916. Oct. 26, 27; Nov. 2. *Schiller, K.C.*, and *Bernard Campion* (for *C. K. Tatham*, serving with His Majesty's Forces), for the appellants. 1. Non-delivery of a few carcasses out of a large consignment is not a non-delivery of the consignment within exception 1 of this contract. In other words, non-delivery in this context is not equivalent to short delivery. If this were a case of non-delivery there would be no necessity for the pilferage clause. Non-delivery of a consignment does not include non-delivery of part of a consignment; it means non-delivery of the consignment as a whole. The test is, Is there in a commercial sense a substantial delivery of the consignment? 2. As to two of the consignments the claim was not made in time. Under condition 3, in all cases where there is loss or damage during transit, and the goods arrive but not the whole of them, the time allowed for making the claim is three days after delivery; but where the goods do not arrive at all the time is fourteen days after despatch. The three days applies to short delivery as distinguished from non-delivery.

Rawlinson, K.C., and *F. E. Weatherly*, for the respondent. Upon the construction of this consignment note non-delivery of an appreciable part of the consignment is non-delivery of the consignment. If the consignment is 200 sheep, the company must deliver 200 sheep; if the consignment or package is a portmanteau, the company must deliver the portmanteau, but in that case there is a special clause as to pilferage. Condition 3 strongly supports this construction. This note was designed for the exemption of railway companies from liability, and in case of ambiguity it is to be construed most strongly against the company. If the company desires to

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impose special conditions in exoneration of liability upon its customers, it must do so in unequivocal language: *Henderson v. Stevenson* (1). It may be said that on the construction adopted by the Courts below the appellants would get no advantage by the contract, but that is not so, for, in order to make them liable, the package or consignment must be fully and properly addressed, and they are completely exempted in the case of accidents to trains or fire. [They also contended that the point of construction was not open to the appellants as it had not been taken before the county court judge, and cited *Smith v. Baker & Sons*. (2).]

Bernard Campion replied.

The House took time for consideration.

March 13. EARL LOREBURN. I wish to state to the learned counsel this: The majority of the House place upon this consignment note a construction which is, for the present purpose of this case, favourable to the appellants, but also the majority of the House are of opinion that, the point not having been tried by the learned judge, there should logically be a new trial. But as we apprehend that what the appellants desire is a construction of the note, we ask whether it is necessary to have a new trial and whether it would not suffice for that purpose that the respondent should be left in possession of the 10% note.

The parties by their respective counsel agreed to dispense with a new trial.

EARL LOREBURN. My Lords, what alone matters in this case is the construction to be placed on the owners' risk note.

The railway company are relieved from liability for loss, damage, misdelivery, delay, or detention, subject to a qualification which does not apply here. But the agreement does not exempt the company "in the following cases of non-delivery pilferage or misdelivery (that is to say):—1. Non-delivery of any package or consignment fully and properly addressed." There is again a qualification which does not apply here, so I omit further reference to these qualifications. Ordinarily not liable for a loss, but liable for non-delivery (which is a loss) when the thing not delivered is a

(1) (1875) L. R. 2 H. L. Sc. 470, 481. (2) [1891] A. C. 325, 333.

package or consignment fully and properly addressed. That is the general effect of it. You are to distinguish packages or consignments so addressed from other things, no doubt because it is easier to convey them safely if so identified and addressed.

If it is desired, the consignor can send each article as a separate consignment fully and properly addressed, and then the railway company would be answerable for every single article. Probably this is in many cases practically an impossible thing to do, or it might entail a heavier charge for carriage. But if he does not do that, then, in my opinion, the question is whether or not the consignment as a whole has been delivered.

It was argued that when you have such a package or consignment the railway company is liable unless everything contained in it or of which it consists is delivered—for example, that the loss of one egg out of 500 or of one handle in a piece of furniture amounts to non-delivery of the package or consignment. Subtle arguments might be multiplied on this footing, as all kinds of things are packed or consigned.

In my opinion, it is not a question of law but a question of fact in each case whether there has been delivery or non-delivery, which are the antitheses, the one of the other. And a judge or jury ought to answer the question—was there in substance and in a business sense delivery or not? They would answer it according to the circumstances, as they would answer about the delivery of a cargo, and would look at the nature of the things packed or consigned. If they came to a conclusion which a reasonable man could reach on the evidence, their finding would be supported.

A Court can construe the meaning of words, but I do not think it is a question of construction whether a deficiency in the delivery of a package or consignment amounts to non-delivery of the package or consignment or not. Nor do I think it is possible as a matter of law on this contract to say either that to deliver a consignment means delivering everything that composes it, or to prescribe by percentage or by any other automatic standard what does or does not amount to delivery. I regard it as a question for the jury. We are not assisted by the maxim *de minimis non curat lex*, for that maxim merely applies to negligible trifles. In my opinion the construction is plain. The railway company are not relieved from

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liability where there has been non-delivery of the package or consignment, but the judge of fact or the jury have to say whether or not there has been as a matter of business, in substance, non-delivery. If there were a considerable shortage and the jury found there had been delivery, I should set aside the finding on the ground that there was no evidence to support it, and I do not believe that a Court of law can give more assistance to those who have to decide the facts than by saying that.

In the present case the real question was not put by the counsel on either side, and therefore, if the parties do not come to a settlement, there ought to be a new trial. As all the costs are to be by agreement paid by one of the parties, I should think they will not require that to be done, but I think that should be the order of this House, unless the parties settle it themselves.

You cannot convert a question of fact into a question of law by saying it is inconvenient not to have any certain standard by which you can automatically ascertain liability. The parties here have chosen to make liability depend on the ascertainment of a fact.

VISCOUNT HALDANE. My Lords, it is after hesitation that I have arrived at a conclusion as to the construction of this consignment note, and that hesitation has not been the less because of the eminence and experience of learned judges in the Courts below who have taken a different view. But the question is one of the construction of an ill-drawn and obscure document on which those who have to interpret it must form their own opinions.

The consignment note in controversy is framed with the object of relieving the company from liability as common carriers and under s. 7 of the Railway and Canal Traffic Act, 1854, a section which prohibits contracting out of the principle it lays down, excepting under conditions which may be adjudged just and reasonable by the Court. In particular cases such conditions may be so adjudged if the goods are carried at a reduced rate, and if the stipulations excluding liability are not grossly unfair. I will not read over again the terms of the particular stipulations for carriage at reduced rates under construction in the present case. It is enough that their substance is that the company is to be free from all liability for loss, damage, misdelivery, delay, or detention,

unless, firstly, these are due to the wilful misconduct of the company's servants, or, secondly, they fall under certain specified kinds of non-delivery, pilferage, or misdelivery, which, in the absence of any misconduct of the company's servants, would, but for this exception, come within the sweeping exemption conferred by the main words. Even these specified cases of exceptional liability may be got rid of if the company can prove that they have not been due to negligence or misconduct by themselves or their servants. But if they cannot discharge the burden of proving this, then they are liable if there is non-delivery of any package or consignment fully and properly addressed, unless the non-delivery is due to accident to a train or to fire. A second head under which liability is preserved is that of pilferage from properly covered packages, and a third is misdelivery where goods properly addressed are not tendered to the consignee within twenty-eight days after despatch. This last head points to damage arising from delay caused by goods ultimately delivered to the consignee having previously been wrongly delivered to some other person.

In the conditions annexed to the note there is one in particular, the third, which must be kept in mind in construing the exceptions to which I have referred. It excludes claims in respect of goods for loss or damage during the transit, unless made within three days after delivery of the goods, or, in case of non-delivery of any package or consignment, within fourteen days after despatch. It will be noticed that in the second of these alternatives the expression "package or consignment" is used instead of "goods" as in the first, a variation which suggests that the non-delivery contemplated is not one arising merely by loss of items during the transit, but non-delivery of something which is an entirety. Loss, say by pilferage or other cause of short delivery, would be literally covered by the words in the first alternative, and is apparently meant to be excluded from the second, which is, I think, directed to absolute non-delivery as contrasted with short delivery. This is not without its bearing on the real question in the appeal, which is the meaning of the expression "consignment" in the first of the exceptions to freedom from liability bargained for in the body of the note. Reading the note and the conditions as a whole, I have come, though not with any great degree of confidence, to the conclusion that by

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“consignment” in the first exception is meant the consignment in its entirety of what is included in a consignment note, as distinguished from the items which together make up the consignment. The juxtaposition of “package,” which connotes a single whole, with consignment appears to me to point to this interpretation. It seems, from the second exception, that pilferage is not treated as covered by partial non-delivery, and this indicates that non-delivery of a part is not to be contemplated as within the first exception. As I have already said, there is nothing in the provisions of condition 3, which prescribe the method of claim in all cases, that, as I read it, conflicts with this construction. I do not find myself in agreement with Buckley and Pickford L.JJ. in their interpretation of the word “loss” as it occurs in the third condition. I think that “loss” is there meant to include loss by failure to deliver items as distinguished from the entirety.

My Lords, these considerations dispose of the real question of importance in the appeal. And they seem to me to imply that, on the facts as established before the county court judge, there was a delivery of what was included in the consignment note, a delivery which was short by reason of the loss of certain items at some stage of the transit, but not the less a delivery within the meaning of the condition. This is how I construe his finding, and, if I am right in my interpretation of the note itself, his judgment was consequently wrong.

LORD KINNEAR. (1) My Lords, I have found this case to be one of difficulty. But, after consideration, I am unable to accept the conclusion of the Court below, and I agree with the noble and learned Viscount that the appeal must be allowed. The question before the House, as I understand it, is purely one of construction, since the facts have been ascertained finally, and with sufficient precision, by the learned judge of the county court. I assume, therefore, in accordance with his decision, that certain carcasses of sheep and lambs, parts of three separate consignments from one of the appellants' railway stations to the respondent at Bristol, were not delivered, and that, although the proportion of the undelivered parts to the entire consignments was in each case small and of no

(1) Read by Viscount Haldane.

great value in money, there was still an appreciable difference between the quantities delivered and the quantities consigned. The respondent claims the value of the undelivered carcasses, and I apprehend that if the consignments had been made under an ordinary contract of carriage by which the appellants had undertaken to bring the goods safely to their destination, or to indemnify their owner for their loss or injury, the claim would have been good. But that is by no means the contract between the parties in this case. The appellants, like other railway companies, allow to traders the option of having their goods carried under one or other of two different arrangements. They may be carried at the ordinary rate, which is not alleged to be excessive, under the ordinary liability of a railway company as fixed by statute, or else they may be carried at a reduced rate, provided the sender undertakes to relieve the railway company from all liability for loss or damage, except in certain distinctly specified cases. The respondent adopted the second method, and the consignment note, which is in usual terms and bears to be for "goods to be carried at reduced rates at owner's risk," sets forth that the goods mentioned are "to be carried at the reduced rate below the company's ordinary rate in consideration whereof I agree to relieve the Great Western Railway Company, and all other companies over whose lines the goods may pass . . . from all liability for loss, damage, misdelivery, delay or detention . . . except upon proof that such loss, &c., arose from wilful misconduct on the part of the company's servants"; and under the further exception that "Nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery (that is to say):—1. Non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire." The respondent therefore undertakes for valuable consideration that his goods shall be carried at his own risk and not at the risk of the appellants, except in certain specified cases. I apprehend that such exception, to be effective, must be expressed with explicit accuracy. I do not suggest that the case is governed by any fixed rule of law by which a stipulation of this kind must be construed against or in favour of one party or the other, but still it is for the respondent, who stipulates for an exception in his favour

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from his own clear obligation, to show clearly that the case falls within the terms of the exception, and in this, I think, he has failed. The particular exception upon which he relies is that last quoted—“Non-delivery of any package or consignment fully and properly addressed,” and the question to be decided is simply what is meant by consignment. I am of opinion that, taking the words in their ordinary and grammatical meaning, it means the entire consignment, and not any part or parts of it. The subject of the stipulation is not the consignment or any part of it, but the whole consignment including every part of it. It is regarded as an integral unity. This is in accordance with the assumption on which the pleadings of the parties are stated. They are at one as to the meaning of the word as used in their contract; and there is nothing to suggest that either entertained the slightest doubt as to the identification of the three consignments in question. The respondent does not allege that the consignments have not been delivered, but claims damages for the non-delivery of certain carcasses “which formed parts of three consignments delivered by him to the appellants for carriage” to Bristol; and then sets out that the said shortage “appears in the delivery sheets prepared by the appellants’ servants.” This is quite in accordance with the ordinary use of language. Non-delivery of a consignment is one thing and short delivery of the same consignment is another and different thing; and when the respondent claims damages in respect of short delivery only he does so in terms. But then his exemption from the general risk he has undertaken does not arise in the case of short delivery, but of non-delivery of the entire consignment. It is urged very forcibly that if an appreciable part of a consignment is not delivered the entire consignment is not delivered; and if the thing to be proved were that the appellants had delivered a consignment in terms of a contract to that effect, the argument would be unanswerable. But if the question is whether non-delivery of an entire consignment has been proved, it is irrelevant. It is no part of the appellants’ case that they should prove delivery. They have not insured the safe delivery of the goods entrusted to them; and no obligation of theirs comes into consideration at all until the respondent has exempted himself, by force of the special exception, from his general obligation to take the risk of carriage on himself. The affirmative or negative

of delivery makes all the difference in the meaning and effect of the stipulation. But it does not alter the thing to be delivered. I agree that if a part is not delivered the consignment cannot be said to be delivered. But for the same reason the non-delivery of a part does not prove the non-delivery of the whole.

I agree with the noble and learned Viscount that this view is confirmed by the terms of the second exception which deals with pilferage. This would have been altogether superfluous if short delivery or partial non-delivery had been already covered by the first exception. Goods that have been pilfered in transit are not delivered; and it cannot be suggested that, if the first exception stood alone, short delivery of a consignment would have been covered and short delivery of a package would not. It may be that a package is more obviously a single thing than a consignment, which may be made up of a variety of goods. But each is contemplated as possessing the same degree of unity in this respect, that it must be capable of being fully and properly addressed, and so being regarded as one definite subject of a particular contract. Moreover, the component parts of a package, as of any other consignment, may be disintegrated and scattered in the course of transit. In that case, if any part were missing, there would be short delivery. But the terms of the second exception make it clear that that would not be enough to throw liability on the railway company. For it is only in one particular case, to wit when the packet has been protected otherwise than by paper or other packing easily removable by hand, that the exception comes into force; and even then it is only allowed subject to a proviso that due notice shall be given to the company's servants. All this is to my mind a very significant indication that the case provided for in exception one is that of a total non-delivery of a definite thing which is assumed to be deliverable once for all; and I think the same inference is to be drawn from the third of the conditions on the back, which has been said to be inconsistent with it. It is not the purpose of this clause to define the grounds on which the company's general exemption from liability may be excluded, but to fix the conditions on which claims against the company may be made, assuming them to be in themselves admissible under the contract. But in laying down these conditions it was necessary to provide for the two

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different cases which we have been considering. There may have been a partial or insufficient delivery due to the misconduct of the company's servants, and involving loss or damage to the owner, and in that case it is provided that notice must be given within a certain time after delivery of the goods. Or there may have been a total non-delivery, bringing into force the conditions of exception one; and in that case notice must be given within fourteen days after despatch. I think with my noble and learned friend that the variation of language in the expression of these alternatives is significant. Throughout the contract the same language is used when it is necessary to distinguish between partial delivery and absolute non-delivery of an entire consignment. I venture to think that the interpretation I adopt is in harmony with the declared object and design of the main contract between the parties. The intention is to relieve the railway company of liability for safe delivery in return for a reduced rate. It is not inconsistent with this, that the general exemption should be qualified by certain specific exceptions, resting upon intelligible grounds. But it is not, to say the least, a probable interpretation which makes this exception nullify the rule. The contract is self-contradictory if it means that the consignor is to relieve the railway company of all liability for loss or damage in transit, and at the same time that the company is to be responsible for the safe delivery of all or any part of any consignment.

LORD SHAW OF DUNFERMLINE. My Lords, owing to the difference of opinion among us in this House on the subject of this case, I have given a full reconsideration to it. It humbly appears to me that the result reached by all the Courts below is right.

There are really two questions. The first and most important is whether on a sound construction of the contract between the parties a case of non-delivery arises when it is admitted that there has not been delivery of an appreciable part of the goods consigned. The second question is whether non-delivery of a portion of the goods consigned falls within the scope of "loss and damage during the transit."

The claimant (respondent in the appeal) made three consignments of carcases of sheep and lambs—752 in number—from the appellants' railway station at Avonmouth to himself at Bristol. Each carcase was

separately addressed, and each was marked. Of the total number twelve were not delivered. It is agreed that the case is not to be determined on any principle of *de minimis*, and that it should be taken on the footing put by the county court judge that an appreciable part of the goods consigned was not delivered. It is further agreed that the contract between the parties, which was for carriage at owner's risk, is to be found in the "receive and forward" document addressed by the sender to the railway company. On the footing of that agreement the goods were received, and in it the obligations on the subject of forwarding are to be found.

The important part of the agreement for the purposes of the present case is as follows: After providing for non-liability "for all loss, damage, misdelivery, delay or detention," except where these are caused by the wilful misconduct of the railway servants, the contract proceeds: "But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery (that is to say):—

"1. Non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire.

"2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand provided the pilferage is pointed out to a servant of the company on or before delivery.

"3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within twenty-eight days after despatch.

"Provided that the company shall not be liable in the said cases of non-delivery, pilferage, or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

It could not be disputed that the words "nothing . . . shall exempt from liability" mean, and can only mean, that in the cases not so exempted liability is assumed and undertaken by the company in the specified instances of non-delivery, pilferage, or misdelivery.

Was this then a case of "non-delivery"? That, of course, depends on what delivery means. I hold it to be free from doubt that delivery means the delivery of all and every part of the goods

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received. These goods, all and every part thereof, received by the carrier must be handed over to the consignee. Any other rule would be contrary, in my humble opinion, to the most elementary notions as to the carriage of goods. It will not do to say delivery is satisfied if I give the substantial part of what I got. It might as well be maintained that the obligations of payment were satisfied when the substantial part of the account was paid. Business could not be conducted on so loose a footing.

Accordingly, if this be the case with regard to delivery, namely, that it means delivery of the whole and every part of the goods consigned, then the negation of that, namely, the case of non-delivery, arises when such delivery does not occur. When a part is not delivered I cannot see how it can be affirmed that the whole and every part has been delivered. In the realm of logic it is inadmissible that a universal affirmative can stand alongside of a partial negative. When a partial negative is postulated the universality of the affirmative is destroyed. And in the realm of business the proposition would be repudiated that when a consignment of goods, separately ticketed, addressed, and numbered as here—it may be carcasses as in this case, or it may be articles of great value such as statuary or pictures—fails to reach the consignee in full, then a case of non-delivery has not occurred. As Lord Wrenbury says, “I am unable to agree that a delivery of twenty-nine is a delivery of thirty.” And I do not see my way to introduce or to sanction in the legal construction of this contract a proposition which is inadmissible in logic and would be repudiated in the ordinary practice of business.

The view that the case of non-delivery does not arise unless there is non-delivery of the entire aggregate of the consignment is defended by a reference to the word “consignment”—a single substantive. But that substantive either means the act of consigning or the goods consigned; and here it clearly means the latter. And the fact that a “package” is also mentioned, and that pilferage therefrom (if securely packed) is provided for, points, by way of contrast, to package being one thing—a unity—forwarded as such, and out of which unity pilfering may take place. But it is not so with a consignment: the consignment may have great variety; it may be forwarded in several lots, in several trucks, or in several trains,

and yet may be all under one consignment note covering and meant to cover each and every part of the goods consigned.

Accordingly, in the case of a consignment, what is meant by short delivery ? Short delivery simply means that there has been delivery of one part of the goods consigned and non-delivery of another part of the goods consigned. The obligation was to deliver all and every part ; where part is delivered, quoad that part the contract has been obeyed, and liability is not incurred. Similarly the liability was in respect of all and every part ; where part is not delivered, quoad that part the contract has not been obeyed and liability is incurred.

Much was made in argument of condition 3, annexed to the contract. That condition, in my opinion, strikingly confirms the view just taken of the rights of parties. It is in these terms :

“ 3. No claim in respect of goods, for loss or damage during the transit for which the company may be liable, will be allowed unless the same be made in writing within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit, as specified in condition 6, or in the case of non-delivery of any package or consignment within fourteen days after despatch.”

My Lords, I am clearly of opinion that the loss or damage here mentioned is loss or damage upon the goods delivered. It is to be observed (1.) that the claim is “ in respect of goods ”—not in respect of a consignment in the aggregate ; (2.) that the loss or damage is “ during the transit ”—which must, I think, mean that the damage takes place to part or the whole of the goods in the course of their passage from the consignor to the consignee. But any doubt on this point appears to be removed by this, that (3.) the claim is to be intimated “ within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit.” The meaning of this appears to me to be that after all the goods are to hand the merchant makes up and within three days presents his claim for any loss or damage that he may have found the goods delivered may have suffered.

The whole of this—the claim in respect of loss or damage which must be claimed for within three days of delivery—is entirely apart from the separate case, “ the case of non-delivery,” the claim in

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respect of which is to be made within fourteen days of despatch. Nothing could more clearly show, I venture to think, the differentiation of the case of non-delivery from the case of loss or damage, which loss or damage can only be claimed after delivery. In my humble opinion, both upon this condition and upon the other parts of the contract "the case of non-delivery" of a consignment has occurred and is the subject of claim when a portion of the goods consigned has not been delivered.

I am accordingly of opinion that the appeal should be disallowed.

LORD PARMOOR. My Lords, the respondent, who is a meat salesman, claimed damages in the county court from the appellants for the non-delivery of certain carcasses of frozen mutton, which formed parts of three consignments delivered by him to the appellants for carriage from Avonmouth to Lawrence Hill Station, Bristol, to be delivered thence to his order. The learned county court judge found as a fact that the carcasses which had not been delivered formed an appreciable part of each of the three consignments. This finding is sufficient to raise the legal points involved in the appeal and is not open to review. The question in debate before your Lordships depends on the construction of the owner's risk consignment note on which the consignments were received and forwarded by the appellants.

Up to the year 1854 railway companies had power to act as carriers over their railways, but there was no obligation upon them. When railway companies did undertake to act as carriers it was not unusual for them to attempt to limit their liability by general conditions contained in public notices. In 1854 a new obligation was imposed on railway companies, and a duty was imposed on them, according to their respective powers, to afford all reasonable facilities for the receiving, forwarding, and delivery of traffic upon the several railways and canals belonging to, or worked by, such companies, and for the return of carriages, trucks, boats, and other vehicles. By s. 7 of the same Act railway companies were made liable for the loss of, or for any injury done to, animals or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by

such company contrary thereto, or in anywise limiting such liability ; every such notice, condition, or declaration being declared to be null and void. It was, however, provided that nothing contained in the Act should be construed to prevent railway companies from making such conditions with respect to the receiving, forwarding, and delivering of animals or goods as shall be adjudged by the Court or judge, before whom any question relating thereto shall be tried, to be just and reasonable. No question arises in the present appeal as to whether the terms of the owner's risk consignment note are just and reasonable. This question has been raised in many cases, and it has been decided that it is a matter wholly for the decision of the Court or judge, although it may involve questions of fact. It is further provided that the special contract shall not be binding upon or affect any party unless the same is signed by him or by the person delivering such animals or things for carriage. In the present case the special contract was signed by the respondent.

Since 1854 goods have been largely carried by railway companies under owner's risk consignment notes, the traders being willing to limit the liability of the railway company in return for being charged at a lower rate. In the present case the consignment note is in the usual modern form, and may be found in text-books on railway law. Your Lordships were informed that this form had been generally adopted by the railway companies in order to obtain uniformity and to avoid discrimination between different railway systems. The consignment note commences with the notice that there are two rates of carriage at either of which the goods may be consigned at the sender's option—one the ordinary rate, when the company take the ordinary liability of a railway company ; and the other a reduced rate, adopted when the sender agrees to relieve the company and certain other companies or persons from all liability for loss, damage, misdelivery, delay, or detention, except (1.) upon proof that such loss arose from wilful misconduct on the part of the company's servants, (2.) in the case of such non-delivery, pilferage, or misdelivery as is hereunder mentioned. It was said that (2.) had been added at the instance of the traders, and there is no doubt that owner's risk consignment notes have been held just and reasonable, although they protected the railway companies from all liability for loss or damage except upon proof that such loss or damage had

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arisen from wilful misconduct on the part of the company's servants, so long as the sender had the choice of a reasonable alternative ordinary rate.

The note then contains the usual direction to the railway company to receive and forward the goods at the reduced rate, in consideration whereof the respondent agrees to relieve the railway company and certain other companies and persons from all liability for loss, damage, misdelivery, delay, or detention (including detention of traders' trucks), except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. If the note had stopped at this point I think that the word "loss" is applicable both to a case of non-delivery and short delivery, and that the respondent could not have recovered unless he could prove that the loss had arisen from wilful misconduct on the part of the company's servants. I agree with the opinion expressed by Lush J. that from the point of view of the consignee there is no difference between goods being lost and goods being not delivered. Then follows the paragraph: "But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery" (that is to say):—

"1. Non-delivery of any package or consignment fully and properly addressed, unless such non-delivery is due to accident to trains or fire Provided that the company shall not be liable on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

An attempt was made at the trial to prove that the non-delivery had not been caused by the negligence or misconduct of the company or their servants, but this failed. The consignment was fully and properly addressed, and the non-delivery was not due to accident to trains or fire. The case therefore turns on the meaning of the words "non-delivery of any package or consignment." In its ordinary sense "consignment" means the entirety or aggregate of the goods comprised in a consignment note. I am unable to hold that the ordinary meaning of consignment is not applicable where the subject-matter is non-delivery, or that in this contract it has any other than its ordinary meaning, the entirety of

the goods comprised in the consignment note. No doubt there may be non-delivery of part only of a consignment just as there may be delivery of part only of a consignment, and, in my opinion, on the finding of the county court judge, there has been a non-delivery of part of a consignment in the present case. If this is the correct meaning of the term "consignment," then the question arises whether, to use the words of Bray J., "the non-delivery of a consignment includes non-delivery of part of a consignment," or, in other words, whether the condition should be read "non-delivery of any package or consignment or part of consignment." My Lords, I cannot think it is right to interpolate the words "part of a consignment" unless the interpolation is necessitated either by the special context or by the terms of the consignment note regarded as a whole. With all respect to the learned judges who have decided in favour of the respondent, it appears to me that neither the special context nor the terms of the consignment note, regarded as a whole, support the interpolation in the contract of the words "part of a consignment." It is admitted that "package" does not include part of a package having regard to condition 2, which exempts pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand, provided the pilferage is pointed out to a servant of the company on or before delivery. If "package" does not include part of a package, it would seem to be inconsistent that, in the same context, "consignment" should be construed as including part of a consignment. The words "fully and properly addressed" which follow "consignment" are not applicable to part of a consignment any more than they would be applicable to part of a package; but in any case I am unable to hold that there is anything in the special context which can justify the interpolation of the words "part of a consignment" which the contracting parties have not used. I should come to the same conclusion having regard to the general terms of the contract in the consignment note. Apart from condition 3 of the general conditions, to which I propose to refer later, I think it is difficult to read consistently exceptions 1 and 2 if the non-delivery of a consignment includes non-delivery of part of a consignment. This difficulty was evidently present to the mind of Lush J. Exception 1 includes under this head loss both in the case of non-delivery and of short delivery, and if exception 2

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has the same ambit, then short delivery as well as non-delivery is in substance removed from the operation of exception 1. I do not overlook the limitation that a consignment must be fully and properly addressed and that the non-delivery must not be due to accident to trains or fire, but in ordinary practice a consignment is fully and properly addressed, and the losses due to accident to trains or fire would be by no means coextensive with the losses in respect of short delivery, for which, under exception 1, the consignee has no claim except upon proof that the loss arose from wilful misconduct on the part of the company's servants.

Much reliance was placed in the argument on behalf of the respondent on the terms of condition 3 of the general conditions, and there is no doubt that this argument had much weight both in the Divisional Court and the Court of Appeal. I think that, as a matter of construction, if there is any inconsistency between the special terms of the consignment note, and the general conditions on the back of the note, the special terms should prevail, but I am unable to find any inconsistency. Condition 3 is a rule of procedure which limits the time within which a claim must be made in respect of goods for loss or damage during transit. It must be made within three days after delivery of the goods in respect of which the claim is made. Take the instance of a claim for loss from short delivery. It must be made within three days after the short delivery of the goods in respect of which it is made, this being the time at which the short delivery would come to the notice of the trader. It is not necessary in the present case to consider when the short delivery was complete, but the condition provides that delivery is to be considered complete at the termination of the transit as specified in condition 6. Condition 3 further provides "or in the case of non-delivery of any package or consignment within fourteen days after despatch." A provision of this character is obviously necessary where there has been a non-delivery of a package or consignment, or, in other words, where there has been a loss of the whole package or consignment. In my opinion the words "package or consignment" have the same meaning in condition 3 of the general conditions as in condition 1 on the face of the consignment note, and I think that in both cases "consignment" is used in its ordinary sense of the entirety of the goods comprised in the consignment note. If there had been a

non-delivery of an inappreciable part of a consignment, I think that the principle "de minimis" would apply, but on this point the finding of the county court judge is conclusive.

My Lords, in my opinion the appellants succeed, but in the Divisional Court it was properly made a condition of giving liberty to appeal that in any event the appellants should pay the costs of both parties.

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Order of the Court of Appeal reversed, and (the parties agreeing to dispense with a new trial) judgment entered for the appellants (by consent) : the appellants to pay the costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, March 13, 1917.

Solicitor for appellants : *L. B. Page.*

Solicitors for respondent : *Billing & Co., for Fairfax Spofforth, Bristol.*

[PRIVY COUNCIL.]

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 ~~~~~ AND  
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## ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC.

*Canada (Quebec)—Jury—Failure to revise List—Verdict—Requête Civile—Quebec Code of Civil Procedure, arts. 430, 431—R. S. Q., 1909, art. 3426.*

The verdict of a jury in an action will not be set aside on account of irregularities in the due revision of the jury list unless the litigant applying proves that he has been prejudiced thereby.

The circumstances under which a statutory provision for the performance of a public duty should be treated as being merely directory, considered.

APPEAL from a judgment of the Superior Court, sitting as Court of Review in the district of Montreal (May 15, 1915), affirming the judgment of Monet J.

The respondent, in an action for damages against the appellants in the Superior Court, obtained a verdict and judgment. No challenge was made at the trial either to the array or to any individual juror.

The appellants subsequently proceeded by a requête civile for a revocation of the judgment. The grounds of the application were (1.) that the list of grand jurors had not been annually revised in accordance with art. 3426 of R. S. Q., 1909, and that consequently the civil jury list (which under arts. 430 and 431 of the Code of Civil Procedure) is to be prepared and revised by the prothonotary for each district in accordance with the grand jury list, was irregular ; (2.) that one of the jury was disqualified under art. 455 (2.) of the Code, and further that he was guilty of conduct which vitiated the verdict.

The facts, the material provisions of the law of Quebec, and the effect of the decisions of the Courts in Quebec are stated in the

\* *Present* : VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD PARKER OF WADDINGTON, and SIR ARTHUR CHANNELL.

judgment of their Lordships. The judgment of the Superior Court is reported at Q. R. 38 S. C. 21.

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1916. Nov. 30. *Sir J. Simon, K.C.*, and *Rinfret, K.C.*, for the appellants. There was uncontradicted evidence that the grand jury list had not been revised under art. 3426 of R. S. Q., 1909, for several years. The civil jury list was consequently unrevised under art. 431 of the Code, and the panel was without jurisdiction. A challenge to the array would have succeeded: *Grose v. Holmes Electric Protection Co.* (1) The appellants had no means of knowledge of the irregularity at the trial. Where the circumstances would have justified a challenge to the array but the litigant is ignorant of them at the trial, a verdict will be set aside: *Lady Hubert v. Shaw* (2); *Rex v. Tremearne* (3); *Rex v. Sutton* (4); *McKay v. Glasgow and London Insurance Co.* (5); *Rex v. McCrae* (6); Tidd's Practice, 9th ed. (1828), vol. 2, p. 926. The statutory provisions as to the preparation and revision of the jury list cannot be treated as merely directory. That is to be inferred from *Mulcahy v. Reg.* (7) The tribunal being without jurisdiction, it was not necessary for the appellants to prove prejudice; from the nature of the case it was not possible for them to do so. A requête civile was the correct procedure, since the facts had to be proved. Under art. 498, upon appeal a new trial could not have been granted on this ground. The judgment of the King's Bench is conclusive as to the procedure. Further, upon the evidence the conduct of the juror Hector Barsalou vitiated the verdict.

*Sir R. Finlay, K.C.*, and *Duff, K.C.*, for the respondent. The appellants should have made a challenge to the array. It would be mischievous if after a trial had proceeded to verdict without a challenge a litigant could obtain a new trial on the ground of irregularity without proof of damage: *Williams v. Great Western Ry. Co.* (8) A challenge to the array would have failed as the prothonotary had prepared the jury list according to the grand jury list deposited with him and had received no notification of a revi-

(1) (1895) Q. R. 9 S. C. 374.

(2) (1706) 11 Mod. 118.

(3) (1826) 5 B. &amp; C. 254.

(4) (1828) 8 B. &amp; C. 417.

(5) (1888) 32 Lower Canada Jurist, 125.

(6) (1906) Q. R. 16 K. B. 193.

(7) (1868) L. R. 3 H. L. 306.

(8) (1858) 3 H. &amp; N. 869.



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sion. The provision of art. 3426 is merely directory. The remedy by requête civile is not applicable to trial by jury; that mode of trial is governed exclusively by the Code and statutory provisions.

[They were stopped.]

*Rinfret, K.C.*, in reply, referred to *Bélanger v. Rex*. (1)

1917. Jan. 23. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. The respondent in this case was plaintiff in an action against the appellant company in the Superior Court of Quebec to recover damages for personal injuries sustained by him when travelling in a tramcar of the appellants' by a collision with another tramcar of the same company. The action was tried before a special jury, who gave a verdict for the plaintiff for 12,000 dollars on December 12, 1912, and judgment was given for the plaintiff for that amount. The appellants on January 10, 1913, took proceedings to have the judgment set aside on the ground that the jury had not been duly constituted and was without jurisdiction, and also that one of the jurors was relative to and was connected by affinity with the plaintiff and was not indifferent between the parties, and also that in the course of the trial communications in reference to the case passed between the plaintiff, his relatives, and those who were conducting his case, and that juror and other jurors. At the trial there had been no challenge either to the array or to any individual juror.

These proceedings ultimately failed, and by a judgment of the Superior Court, sitting as Court of Review in Montreal, the judgment in favour of the plaintiff was upheld. From the judgment of the Court of Review this appeal is brought. The questions argued before the Board were whether, on the grounds alleged, or either of them, the judgment at the trial ought to have been set aside, and whether the procedure taken for setting it aside was correct in form. There are also proceedings taken to set aside the verdict and judgment on the ground that the damages were excessive; but these are standing over pending the decision of this appeal. What the appellants did on January 10, 1913, was to present a petition in revocation of judgment, known in Quebec as a requête civile,

(1) (1902) Q. R. 12 K. B. 69,

which came on to be heard before Beaudin J. on January 27, who held, without going into the evidence, that requête civile was not the proper way to raise the question. An appeal from this decision was taken to the Court of King's Bench (Appeal side), which Court, by a majority, on October 30, 1913, allowed the appeal, ordered the reception of the petition, and remitted the record to the Superior Court for proof and hearing of the issues contained in the petition. This proof and hearing took place on November 21, 1914, when the judge (Monet J.) heard the evidence and dismissed the petition on the merits. He also disallowed a demurrer by the respondent to the petition, following, in so doing, the judgment of the King's Bench (Appeal side). The appellants appealed to the Court of Review from the decision of Monet J. disallowing his requête civile, but the respondent did not appeal from the disallowance of his demurrer. The Court of Review affirmed the judgment of Monet J., but a majority of the judges were of opinion that the proceedings were wrong in form, and should have been dismissed on that ground as well as on the merits. The most important question on the appeal to this Board is as to the effect of serious irregularities in the preliminary proceedings for constituting the jury panel. On this point Monet J. found that irregularities or breaches of the provisions of law had occurred, but that the appellants could not avail themselves of them because they had not proved any prejudice to have been suffered by them in consequence.

Very elaborate and minute enactments are contained in the Revised Statutes of Quebec (arts. 3409, 3411, 3414, 3416, 3418, 3421, 3423, 3426, 3427, 3428, 3429, and 3462) for the constitution of a revising board to revise annually the jury lists, there being one list of grand and another of petit juries.

The municipalities are directed to give notice to the sheriff of new names of qualified persons and of the deaths, removals, or exemptions of those on the old lists. The board, of which the sheriff is a member, and apparently president, sit in private to make their revision, but public notice is given before the lists are sent on to the sheriff. There are detailed provisions as to the mode of revision, as to initialling alterations and additions, and as to the times of various steps and other matters. The lists so revised serve for criminal and possibly other purposes, and from the list of grand

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1917 by art. 3429, immediately after the revision of the list, is to notify  
the prothonotary, who is then to correct his list. The protho-  
notary's duties are prescribed by art. 430 and following sections of  
the Quebec Code of Civil Procedure. He is bound to make a list of  
the persons qualified to serve as jurors in civil cases by taking from  
the list of persons qualified to serve as grand jurors in criminal  
cases which is deposited in his office the names of all persons residing  
within fifteen miles of his office in the order in which such names  
appear, and he is to revise his list immediately after receiving notice  
from the sheriff that he has completed the revision of the grand jury  
list. Then when an order is made for the trial of a civil cause by  
a jury the names are taken in order from the list to form a panel  
for that case, and proceedings are taken for reducing the number  
for trial of the cause, which appear similar to what is known in this  
country as striking a jury under the old practice, still permissible  
by special order.

On the hearing of the requête civile before Monet J. it was proved  
that in the year 1912, when the cause was tried, these provisions  
had for several years been neglected by the sheriff. There had been  
no revision at all, and old lists had been used. So far as the pro-  
thonotary was concerned, it is not clear that he in any way neglected  
his duties, inasmuch as he used "the list deposited in his office"  
of grand jurors, although that was, of course, an old one, not duly  
revised by the sheriff and board. From that prothonotary's list  
the names for this jury were duly taken in order. The statutes  
contain no enactment as to what is to be the consequence of non-  
observance of these provisions. It is contended for the appellants  
that the consequence is that the trial was coram non judice and must  
be treated as a nullity.

It is necessary to consider the principles which have been adopted  
in construing statutes of this character, and the authorities so far  
as there are any on the particular question arising here. The ques-  
tion whether provisions in a statute are directory or imperative has  
very frequently arisen in this country, but it has been said that no  
general rule can be laid down, and that in every case the object of  
the statute must be looked at. The cases on the subject will be  
found collected in Maxwell on Statutes, 5th ed., p. 596 and following

pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hale, P. C., p. 50, *Rex v. Leicester Justices* (1), and Parke B. in *Gwynne v. Burnell* (2) ); to provisions as to rates (*Reg. v. Inhabitants of Fordham* (3) and *Le Feuvre v. Miller* (4) ); to provisions of the Ballot Act (*Woodward v. Sarsons* (5) and *Phillips v. Goff* (6) ); and to justices acting without having taken the prescribed oath, whose acts are not held invalid (*Margate Pier Co. v. Hannam* (7)). In the case now before the Board it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the list ipso facto null and void, so that no jury trials could be held until a duly revised list had been prepared. As to the objects sought to be attained by these elaborate provisions for the mode of preparing the lists, there seem to be three things aimed at: first, to distribute the burden of jury service equally between all liable to it; secondly, to secure for the use of the Courts effective lists of jurors likely to attend when called, the names of dead men and absent or exempted men being left out; thirdly, to prevent the selection of particular individuals for any jury, commonly called packing. The duties imposed on the sheriff appear intended for the first and second of these purposes, and those of the prothonotary for all the three. His duty to take the names in rotation prevents packing, and his taking the names next after those who last served distributes the burden. In this case the prothonotary had a list in fact, although an old one, and the men on it had all been qualified, and probably in most cases remained so. The names were taken in proper rotation, and

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(1) (1827) 7 B. &amp; C. 6.

(4) (1857) 26 L. J. (M.C.) 175.

(2) (1835) 2 Bing. N. C. 7, 39.

(5) (1875) L. R. 10 C. P. 733.

(3) (1839) 11 Ad. &amp; E. 73.

(6) (1886) 17 Q. B. D. 805.

(7) (1819) 3 B. &amp; Al. 266.



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those ultimately sworn appear all to have been qualified. As to some of the matters, such as the omission to initial correct alterations, it would be impossible to hold that these made the whole list null and void. Having regard to the nature of the sheriff's duties and their object, it seems quite unnecessary and wrong to hold that the neglect of them makes the list null and void; and although the prothonotary's neglect, if it had been in the matter of the order of taking the names, might have resulted in a packed jury, the neglect, if there had been any in other matters, would be of the same kind as the sheriff's. It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box, to stand good, than to hold the proceedings null and void. So to hold would not, of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been had. The view taken by Monet J. that he ought not to interfere where the appellant had shown no prejudice appears very reasonable, and their Lordships are of opinion that it is also in accordance with the authorities. Taking first the Canadian cases to which counsel referred. The case most relied on was *Grose v. Holmes Electric Protection Co.* (1) In that case the facts are to be gathered from the judgment, which is set out in full in the report, and it seems that there had been somewhat similar neglect by the sheriff in his duties as to jury lists as in the present case; but the prothonotary also had, in direct breach of the Code, omitted names standing next in order and taken others lower down. This amounted to a process of packing the jury, and might possibly have been done with that intention. The minor breaches, such as want of initials, are recited in the judgment, but the facts as a whole clearly show prejudice, to use Monet J.'s phrase, and show the very mischief to have happened which it was one of the objects of the statute to prevent. That a challenge to the array was allowed in that case is quite consistent with Monet J.'s decision. *Rex v. McCrae* (2), also quoted, was a case of murder, and after a verdict of guilty the conviction was quashed on grounds going to the merits, but it was also held by a majority of the Court that the swearing and inclusion in the jury of a person assigned by mistake, but whose name was not written

(1) Q. R. 9 S. C. 374.

(2) Q. R. 16 K. B. 193.

in the panel of jurors, and who had not the qualifications required by law for being one of the jury, is illegal, and a verdict returned by a jury so composed is null, and should be quashed. This seems to have little to do with the matter, as here no juror is shown to have been disqualified, and if one had been, probably *Monet J.* would have held it to be "prejudice." The difference of opinion amongst the judges in that case arose from the different views taken as to certain sections of the Criminal Code which have no application to the case now before the Board. *McKay v. Glasgow and London Insurance Co.* (1), also quoted, merely shows that if a juror is, in fact, interested, and has not been challenged, his interest not being known until after the trial, a new trial will be granted, which obviously has no bearing on the point now under consideration. Of the English cases, *Mulcahy v. Reg.* (2) was a writ of error on a criminal conviction taken to the House of Lords. The trial had taken place in one year under a commission opened in the previous year. There were lists of jurors duly made out according to the provisions of the statutes relating to the matter for each of the two years. The jury had been taken from the list for the first of the two years, and it was argued that it should have been taken from the list for the year in which the trial took place. The judges were summoned, and questions put to them in the usual way, and Willes J. delivered the opinion of the judges to the effect that the right list had been taken. This is relied on to show that such provisions are not merely directory, otherwise the elaborate judgment actually delivered would not have been silent on such a point. But the question there was merely which list should be taken; each list had been duly made, and no provisions as to the making of lists were broken. But Willes J. does guard himself against inferences being drawn from his judgment as to points which he had not expressly dealt with by saying "Assuming, therefore, that this sort of objection by way of challenge either to the array or the poll is competent in any case it was unfounded in this." Another case referred to in the argument was *Williams v. Great Western Ry. Co.* (3), which shows that the omission to challenge, although the facts were not known until after the time for challenge, is not without effect on the rights of the parties, and

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(1) 32 Lower Canada Jurist,  
125.

(2) L. R. 3 H. L. 306, 316.

(3) 3 H. & N. 869.

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a comparison of that case with *Doe v. Michael* (1) shows that while in England the fact of a juryman being open to challenge, discovered after verdict, may be ground for a new trial, yet it is discretionary with the Court to grant it, and it will not do so when it is of opinion that no prejudice has been done. Their Lordships therefore are of opinion that the decision of Monet J. on the objection to the verdict founded on the omission duly to revise the lists was right. Counsel for the appellants pressed the Board not to weaken any of the safeguards provided by the Legislature for securing fair and impartial juries, but their Lordships fail to see that the decision of Monet J. has that effect.

As to the next point, the juror objected to was one Hector Barsalou, who was brother of Erasmus Barsalou, who was husband of an aunt of the plaintiff. It is obvious that this is not relationship or affinity. But Erasmus Barsalou had been the tutor or testamentary guardian of the plaintiff, who was at the time of the trial not much over twenty-one, and whose father had died when the plaintiff was an infant, so that Erasmus Barsalou had brought him up. Hector Barsalou no doubt knew the plaintiff fairly well as his brother's ward, but that was all, and both he and Erasmus gave evidence satisfactory to the judge as to interest in the cause. The case as to communications with the jury broke down. The witnesses who gave the strongest evidence as to it were claim agents of the appellant company, and it was their duty to inform the appellants' legal advisers at once if during the trial they observed anything which at the time they really thought serious. During the trial appellants' counsel did have some information given him which led him to ask Hector Barsalou if he was allied to the plaintiff. He answered truly that he was not, and the question was not pushed further. The judge finds emphatically that the appellants proved no case on these points. The Court of Review adopted the findings of fact of the judge. Their Lordships would require a very strong case to induce them to differ with the judge who heard the witnesses, and on a consideration of the evidence they find no such case, but, on the contrary, agree with the judge.

As to the point whether a requête civile was the proper procedure, their Lordships do not think it open, as neither the decision of the

Court of King's Bench nor the disallowance of the demurrer by Monet J. was appealed from. The decision of the King's Bench was not interlocutory for the purpose of an appeal from it under the rule acted on in this country, as it would have been final if decided the other way. Even if open, a decision on the point is unnecessary, as, in their Lordships' view, the requête civile failed in proof, and their Lordships would not desire, unless it were necessary, to express any opinion on a question of form and practice in the Quebec Courts, with which the judges of those Courts are far more familiar than they are.

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Their Lordships see no reason for interfering, as they were asked to do, with any of the interlocutory orders as to costs, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Lawrence Jones & Co.*  
Solicitors for respondent : *Jacobs & Greenwood.*

[PRIVY COUNCIL.]

DOMINION IRON AND STEEL COMPANY, } APPELLANTS ;  
LIMITED . . . . . }  
AND  
BURT . . . . . RESPONDENT.

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[AND CONNECTED APPEALS.]

ON APPEAL FROM THE SUPREME COURT OF NOVA  
SCOTIA.

*Canada (Nova Scotia)—Railway—Alteration of Highway—Order in Council—Deposit of Plan—Payment of Compensation—Nuisance—Nova Scotia Railways Act (R. S. N. S., 1900, c. 99), ss. 88, 124, 159, 178.*

The appellants owned a provincial railway which crossed a highway in Nova Scotia. In pursuance of an order made by the Governor in Council under s. 178 of the Nova Scotia Railways Act (R. S. N. S., 1900, c. 99) they altered the highway so as to pass under the railway, and thereby necessarily caused injury to the respondent's property. The appellants did not deposit a map or plan of the alteration under

\* *Present* : VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD PARKER OF WADDINGTON, and SIR ARTHUR CHANNELL.



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s. 124 of the Act, nor did they take any steps to compensate the respondent. The respondent sued the appellants for damages :—

*Held*, that the appellants were not entitled to proceed with the work until they had (a) deposited a map or plan under s. 124 of the above-mentioned Act; (b) paid or tendered, under s. 159, the awarded or agreed compensation for such injurious affection as would necessarily result from the work; and that the appellants consequently had acted illegally, and that the action was maintainable.

CONSOLIDATED APPEALS from judgments of the Supreme Court of Nova Scotia (December 20, 1915) affirming judgments of Longley J. at the trial.

The appellants and the Dominion Coal Company, Limited, owned and operated railways which crossed at rail level Victoria Street, a public highway in the city of Sydney, Nova Scotia. The respondent Burt owned and occupied lands and premises fronting Victoria Street near the point of intersection. The city council having represented to the Governor in Council the dangerous nature of the crossing, an inquiry was held at which the various parties interested were represented. On April 29, 1911, the Governor in Council made an order, under the Nova Scotia Railways Act (R. S. N. S., 1900, c. 99), providing for the construction of a subway by which the street traffic would be carried underneath the lines of railway at the point of intersection. The order provided that the work should be carried out by the appellants, the cost being borne in certain proportions by the companies and by the city of Sydney, the last named being liable for "all the land damage." Detailed plans and specifications were to be submitted by the appellants for the approval of the Governor in Council.

The appellants carried out the work in accordance with the order, but did not deposit any map or plan with the Commissioner under s. 124 of the Nova Scotia Railways Act. The alterations necessarily injured the respondent Burt's premises by taking away the direct access from them to the carriageway of the street and by encroaching upon and altering the sidewalk. He brought an action against the city of Sydney to recover the damages which he had sustained, relying on the provision in the order. The Supreme Court of Canada (in an appeal reported at 50 Can. S. C. R. 6) by a majority affirmed the decisions of the trial judge and of the Supreme Court of Nova Scotia holding that the action was not maintainable.

The respondent Burt thereupon brought the present action against the appellants for damages. The trial judge and the Supreme Court of Nova Scotia gave judgment for the plaintiff and they referred the question of damages. The learned judges held that they were bound by the decision of the Privy Council in *Corporation of Parkdale v. West* (1) as interpreted by the Supreme Court of Canada in the former action.

The respondents in the connected appeals were also frontagers, the circumstances in their cases being substantially the same as those with regard to the respondent Burt.

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1916. Nov. 27, 28. *P. O. Lawrence, K.C., Hector McInnes, K.C., and T. T. Paine*, for the appellants. The appellants carried out the work under the order of the Governor in Council; they consequently committed no trespass or nuisance. The inquiry was held, and the order made, under s. 8 of the Nova Scotia Railways Act. The respondent could have obtained an assessment of compensation under s. 8 (i.), and could have made the order an order of the Supreme Court under s. 14. The appellants were authorized to comply with the order by ss. 178 and 179 of the Act, and under s. 180 were liable to penalties if they failed to do so. The appellants are entitled to be indemnified by the city if they pay compensation; they have not that right if they are held liable in trespass. A deposit of the map or plan was not necessary; s. 179 was introduced expressly to enable work ordered under s. 8 to be carried out outside the general provisions of the Act. Sect. 178 does not apply the provisions as to the deposit of plans except where land is required. In *Corporation of Parkdale v. West* (1) the statute considered was the Consolidated Railways Act, 1879 (42 Vict. c. 9, Canada), and the amending provision in s. 4 of 46 Vict. c. 9, Canada. The Act there considered contained no sections corresponding to s. 8, s. 88 (which gives a right to compensation for injurious affection by work already done), or s. 179 of the Nova Scotia Railways Act. The plaintiff in that case had no means of recovering compensation unless s. 4 of 46 Vict. c. 24 (corresponding to s. 178) were interpreted as applying the provisions as to the deposit of a plan. In *North Shore Ry. Co. v. Pion* (2) the same circumstances arose. The decision in *Jones v. Stanstead Ry.*

(1) (1887) 12 App. Cas. 602.

(2) (1889) 14 App. Cas. 612.

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*Co.* (1) applies to this case. [Reference was also made to *Holditch v. Canadian Northern Ontario Ry. Co.* (2)]

*Langille, K.C.*, and *Hon. M. Macnaghten*, for the respondents. The appellants not having deposited a map or plan were trespassers. The order was made and the work carried out under s. 178. The section is in the same terms as s. 4 of 46 Vict. c. 24, considered in the *Parkdale Case*. (3) That case and *North Shore Ry. Co. v. Pion* (4) are conclusive in the respondent's favour. Sect. 4 of 46 Vict. c. 24 has been re-enacted in the Railway Act of Canada; the interpretation placed upon it by the Board should not be departed from. If the work was not done under s. 178, it was done under s. 85, but the power given thereby is subject to the provisions of the Act, including those as to the deposit of a plan. The work was an alteration of the original plan under s. 124, and s. 125 makes the deposit of a plan a condition precedent. There was a second ground for the decision in the *Parkdale Case* (3), namely, that the work could not lawfully be carried out until compensation was paid. That is also the case here under s. 159 of the Act. *Jones v. Stanstead Ry. Co.* (1) is distinguishable for the reasons stated in the *Parkdale Case*. (3) The Supreme Court of Canada in *Burt v. City of Sydney* (5) held that the respondents were not entitled to recover against the city.

*P. O. Lawrence, K.C.*, in reply. The decision in *Burt v. City of Sydney* (5) was erroneous. The order was made in the presence of all parties and was binding upon them mutually.

1917. Jan. 25. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The question arising for decision on this appeal is whether the appellant railway company in carrying out certain works in Victoria Road in the city of Sydney (Nova Scotia) acted illegally so as to be liable to a common law action of nuisance at the suit of the several respondents, who have admittedly suffered special damage, or whether it acted legally under its statutory powers, so that the respondents' remedy is by way of compensation under the provisions of the Nova Scotia Railways Act (c. 99 of the

(1) (1872) L. R. 4 P. C. 98.

(3) 12 App. Cas. 602.

(2) [1916] 1 A. C. 536.

(4) 14 App. Cas. 612.

(5) (1914) 50 Can. S. C. R. 6,

Revised Statutes of Nova Scotia, 1900). The question for determination depends entirely on the construction to be placed on the Act to which their Lordships have referred. This Act confers certain general powers on railway companies in Nova Scotia. In the construction of railways it is almost invariably necessary not only to take land, but to do acts which may injuriously affect land not actually taken for the purpose of the railway. The Act accordingly defines the mode in which and the conditions subject to which lands may be so taken or injuriously affected. The scheme of the Act in this connection is reasonably clear. The expression "railway" is by s. 1 (g) defined to include not only the actual-line, but all works connected therewith, and by s. 117 a map or plan and profile of the railway and of its course and direction has to be prepared and (s. 118) deposited with the Commissioner. By s. 159 it is only on payment or legal tender of compensation in respect of lands to be taken or injuriously affected by the company that the company can take any land it requires for the works, or exercise any power which must injuriously affect other land. The method by which the compensation payable can be ascertained is provided for by the Act, the proceedings to ascertain the compensation being originated by a notice from the company to the parties interested, served not less than ten days after the deposit of the map or plan. It is obviously contemplated that the lands which will be injuriously affected by the construction of the works, as well as the lands which will be required for such construction, will be apparent from the map or plan itself. The result of these provisions is that the deposit of the map or plan and the payment or tender of compensation become conditions precedent not only to the taking of land but to the exercise of any power which must necessarily injuriously affect land.

By s. 124, if any alterations from the original plan are intended to be made, a map or plan and profile of such alterations is to be made and deposited in the same manner as the original map or plan and profile, and (s. 125) the alterations are not to be carried out until such map or plan and profile have been deposited, nor (s. 159) until the compensation payable in respect of lands which have to be taken for, or must be injuriously affected by, such alterations has been actually paid or tendered.

It was argued that s. 88 is inconsistent with the provisions of

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the Act being construed as above suggested, but, in their Lordships' opinion, this is not really so. Sect. 88 provides that the company shall, in the exercise of its powers, do as little damage as possible, and make full compensation to all persons interested for all damage by them sustained by reason of the exercise of such powers. It contemplates cases in which a company may, if it act reasonably, avoid altogether, or at any rate minimize, any damage. If, for example, the works include the making of a sunken way in the neighbourhood of houses, the company must, if it can, avoid causing subsidence in such houses, and if, in spite of proper care and caution, subsidence takes place, it must compensate all parties injured thereby.

It would, however, be quite impossible, from a practical standpoint, to make the tender of such compensation a condition precedent to the execution of the works. Until such execution it would be impossible to ascertain whether there would be any damage for which compensation could be awarded. Such a case is not in *pari materia* with cases in which it appears from the deposited map or plan that land not taken for the purposes of the works must nevertheless be injuriously affected—for example, where the map or plan shows that some landowner will be deprived of access to a public highway.

The works which the appellant company have carried out in the present case consist of alterations in Victoria Road, designed with the object of carrying such road under the railway and getting rid of the dangerous level crossing which had previously existed. They were carried out pursuant to a direction of the Governor in Council under the provisions of s. 178. Such a direction cannot of itself confer on the company any power to interfere with the rights of others, but there can be no question that the company had, under s. 85, general powers wide enough to enable them to carry out the works. Nevertheless these works, in their Lordships' opinion, constituted an alteration from the original map or plan within the meaning of s. 124, and it follows that a new map or plan thereof ought to have been made and deposited in manner by that section provided before the company commenced the work. This was not done. It further appears that if such map or plan had been deposited it could not have failed to show that the access of the

respondents to Victoria Road from their adjoining lands must necessarily be interfered with, so that the alterations could not be properly commenced until compensation for such interference had been paid or tendered under s. 159. No such compensation was, in fact, paid or tendered. The result is that, in executing the works directed by the Governor in Council, the company acted illegally, not because they had no power to carry out the alterations, but because they did not trouble to observe the conditions precedent upon which alone their powers could be exercised. What they have done in Victoria Road constitutes, therefore, a nuisance in the highway, for which the respondents, who undoubtedly suffered special damage, had their common law remedy.

Their Lordships have arrived at the above conclusion quite independently of what was said by Lord Macnaghten in the case of *Corporation of Parkdale v. West*. (1) Nevertheless, if s. 88 of the Act be construed as above suggested, there is much to be said for the Board being bound by that decision, so far as it bears upon the true construction to be placed on the concluding paragraph of s. 178. Their Lordships, however, do not rely on such concluding paragraph, and it is therefore unnecessary to deal further with this point.

For the reasons above mentioned their Lordships are of opinion that the orders appealed from were right in so far as they recognized that the appellant company had acted illegally, and that the respondents were entitled to damages. Indeed, the respondents might, strictly speaking, also claim a mandatory order for the restoration of Victoria Road to its former condition. It is suggested that, inasmuch as this Act contains what is sometimes known as a betterment clause, the measure of damage in an action of nuisance is not necessarily the same as the measure of compensation payable under the Act. It is, however, difficult to see how the amount of damages to which the respondents are entitled can in any event exceed the amount which would have been payable to them by way of compensation if the appellant company had proceeded lawfully. The fact that it could have proceeded lawfully and that had it done so the betterment clause of the Act would have applied is not without materiality in assessing the damage.

(1) 12 App. Cas. 602.

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Moreover, it is, in their Lordships' opinion, still open to the appellant company to deposit a map or plan of the works and to take the necessary proceedings for ascertaining the compensation payable under the Act, and, if they do so, the Court in its discretion would be entitled to refuse to make or to postpone the making of any mandatory order. Further, though it is a matter of indifference to the respondents whether what they will receive in respect of any injury to their land be by way of damage or by way of compensation, this is not necessarily so with regard to the appellant company, for in the one case it may have, and in the other it may not have, some remedy over against the corporation of Sydney under the order of the Governor in Council. Under these circumstances it appears to their Lordships that, while the orders below ought to be affirmed, any proceedings thereunder for ascertaining the amount of the damage sustained by the respondents ought to be stayed so as to give the appellant company an opportunity of doing what they ought to have done in the first instance. For this purpose a reasonable interval, say two months, ought to be allowed. If within these two months the company deposit a proper map or plan and proceed, with due diligence, to have the compensation payable to the respondents ascertained in accordance with the provisions of the Act, the stay will become absolute. If within the two months the company do not deposit a proper map or plan and take the necessary proceedings to ascertain the compensation, the stay will be removed. Subject to the above, their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants : *Linklater, Addison & Brown.*

Solicitors for respondents : *Blake & Redden.*

## [PRIVY COUNCIL.]

FRASER AND OTHERS . . . . . APPELLANTS ;

J. C.\*

AND

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CITY OF FRASERVILLE . . . . . RESPONDENT.

Jan. 25.

ON APPEAL FROM THE COURT OF KING'S BENCH  
FOR QUEBEC, APPEAL SIDE.*Compensation — Lands expropriated — Potential Value — Award —  
Evidence of Arbitrator—R. S. Queb., 1909, art. 5795.*

The respondent municipality expropriated the falls of a river and adjacent lands, belonging to the appellants, for the purpose of electric light works which it had been there carrying on as lessor ; the municipality had previously expropriated lands higher up the river and was there constructing a reservoir in order to increase the power of the falls. Arbitrators assessed the compensation at 75,700 dollars ; the appellants sued upon the award. At the trial they called one of the arbitrators who put in evidence notes showing how the amount awarded had been calculated. From these notes it appeared that in order to estimate the potential value of the property the arbitrators had taken the extra power due to the respondent's reservoir and capitalized an estimated profit arising therefrom. There were concurrent findings of the Courts in Quebec that the award was based upon the value to the buyer, and not the value to the sellers :—

*Held*, that there was ample evidence to support the findings, and that the award was properly set aside.

CONSOLIDATED APPEALS from two judgments of the Court of King's Bench for Quebec, Appeal Side (November 13, 1915), affirming judgments of the Superior Court.

The above-named appellants sued the respondent upon an award of arbitrators assessing the compensation payable to them for lands expropriated by the respondent. The respondent sued to set aside the award, and the actions were consolidated. The Superior Court dismissed the appellants' action and set aside the award ; the judgments were affirmed upon appeal.

The facts are stated in the judgment of their Lordships.

\* *Present* : VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, LORD PARKER, OF WADDINGTON, and SIR ARTHUR CHANNELL.



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1916. Dec. 5, 7, 8. *Gore-Browne, K.C., G. G. Stuart, K.C., and D. M. Hogg*, for the appellants. The principle of the award was in accordance with the decisions in *In re Lucas and Chesterfield Gas and Water Board* (1) and *Cedars Rapids Manufacturing & Power Co. v. Lacoste*. (2) The property had a potential extra value in that the power of the falls could be increased by making a reservoir higher up the river. The arbitrators took into account that compulsory powers would have to be obtained for the purpose. They were entitled to consider the extra power and profit obtained by the respondent's reservoir as evidence of the potential value. The evidence of the arbitrator was only admissible to show that the award included some subject-matter which it should not have done; it was inadmissible to show the manner in which the quantum was arrived at: *Duke of Buccleuch v. Metropolitan Board of Works* (3); *Dinn v. Blake*. (4) If the award is set aside the matter should be remitted to the arbitrators. There is no time limit for making an award, and no power to remit to different arbitrators.

*Sir J. Simon, K.C., Lapointe, K.C., and Barrington-Ward*, for the respondent. The award in effect takes into consideration the value to the buyer, and consequently is invalid. The reservoir and the works upon the appellants' land were all one scheme, not two separate schemes. It is fallacious to treat the value of the extra power to the city as evidence of potential value; once the city reservoir was constructed the city ceased to be competitors for the power. The facts are analogous to those in *Sidney v. North Eastern Ry. Co.* (5)

[They were stopped.]

*Gore-Browne, K.C.*, replied.

1917. Jan. 25. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The appellants in this case are the plaintiffs in an action brought by them against the respondent, and the defendants in an action brought by the respondent against them. The object of the appellants' action was to enforce an award of arbitrators dated November 27, 1911, by which the sum of 75,700 dollars was

(1) [1909] 1 K. B. 16.

457.

(2) [1914] A. C. 569.

(4) (1875) L. R. 10 C. P. 388.

(3) (1872) L. R. 5 H. L. 418,

(5) [1914] 3 K. B. 629.

fixed as the sum to be paid by the respondent to the appellants in full compensation for the expropriation of certain property. The action by the respondent was to set the award aside. The cases were consolidated at the trial, and the Superior Court by its judgment dated October 14, 1914, discharged the award with costs and dismissed the appellants' action. The Court of King's Bench for the Province of Quebec (Appeal Side) by two judgments confirmed the Superior Court. The appellants have appealed from these two judgments, and these appeals, which have been consolidated, constitute the present appeal.

The substance of the dispute is connected with a subject which has not been unfruitful in litigation, namely, the determination of the exact principle upon which prospects and possibilities of future development ought to be taken into account in determining the price to be paid for property compulsorily acquired.

The appellants are the owners of the banks and lands adjacent to the waterfalls of the rivière du Loup, known as the Grandes Chutes. These falls are within the limits of the jurisdiction of the respondent city, by whom the water power is required for the operation of a municipal system of electric lighting. It appears that the value of these falls for industrial enterprise has long been recognized, and as far back as 1881 William Fraser, the predecessor in title of the present appellants, granted a lease of the falls and the adjacent lands to a paper pulp company for twenty years at the rate of 30 dollars per year. This lease was extended from time to time, and in 1896 a final extension was granted to the then holder of the original lease for a period of ten years. In 1905, one year before the expiration of this lease, the then lessees, who had used the water to carry on a business of electric lighting, sold the lease and the business to the city for the sum of 60,000 dollars. Since that time the electric light system has been operated exclusively by the municipality, who have been in continuous possession of the Grandes Chutes for that purpose. In 1906 an offer was made by the city to William Fraser for a new lease of twenty-five years, but, though this offer was accepted, no formal lease was executed, and William Fraser died in 1908 with the matter still in abeyance.

On July 10, 1907, the respondents adopted a by-law authorizing them to construct a reservoir higher up the river in order to regulate

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the flow of water and also to expropriate all the necessary land for the purpose of this enterprise. At certain falls lower down the river there was at this time another mill established for the purpose of pulp manufacture, and the lease of the falls and adjacent land, which was of long duration, was held by a company known as the Rivi re du Loup Pulp Company, Limited.

The rivi re du Loup is fed by four tributary streams, which run down through valleys whose natural construction readily permits of the waters being dammed in reservoirs. It is of course obvious that if such reservoirs were constructed it would be possible to regulate the flow of water over the falls of the river so as materially to increase the amount of horse power available at each fall throughout the year. The respondents accordingly in March, 1909, entered into an agreement with the Pulp Company providing that the dams that they proposed to erect in the valleys should be exclusively used for the purpose of the storage reservoirs, and should not be parted with by the city without the express consent of the company, and for this consideration the company agreed to pay four-fifths of the total sum of 18,000 dollars, the proposed cost of expenditure, the future maintenance and repair of the reservoirs being divided between the city and the company in the ratio of one-third to two-thirds.

These reservoirs were in course of erection, when on October 18, 1909, the city passed a by-law authorizing the town to acquire the ownership of the Grand Falls and of the adjacent property necessary for the electric light system, and it was thereby enacted that in default of agreement the property should be compulsorily acquired, and certain loans necessary for the acquisition were thereby authorized. A further by-law to the same effect was passed on June 20, 1910, and a further loan provided for. On September 27, 1910, the respondents passed a resolution expressing their willingness to pay to the proprietors of the lands and the water power the sum of 20,000 dollars, and this was served on the parties.

It is quite unnecessary to examine the authority under which this notice was given. There is no question in this appeal but that the city had full power to take the steps they did, and, for the purpose of determining the value of the property they intended to acquire, September 30, 1910, the date on which the resolution

was served, is accepted by both parties as being the critical date. On that date there were four persons who together owned the interest in the property of the falls and lands originally held by William Fraser. One was the mayor of the town, and he expressed his willingness to sell his share for 5000 dollars. The remaining three proprietors, who are the present appellants, refused, and it therefore became necessary to determine the sum to be paid. The procedure that regulates the fixing of this compensation is to be found in arts. 5790 to 5800 of the Revised Statutes of Quebec. Art. 5795 is in these terms : " If there be no agreement between the parties the value of the immoveable in question together with whatever goes in compensation of the value of such immoveable shall be estimated by arbitrators, named as follows : one by council, one by the owner or on his behalf, and a third by the two former, or, if they cannot agree, by a judge of the Superior Court on demand of any of the interested parties." Art. 5798 is as follows : " In any award rendered by them, the arbitrators shall mention the lot whereof the immoveable taken forms part, the name of the owner of such immoveable, and also the by-law or order of the council under which such immoveable is taken, and shall fix the amount of the indemnity, if they grant one, and if they do not, a statement to that effect shall be entered in such award establishing their refusal." By art. 5797 the award is made final and without appeal.

Under art. 5795 the city council appointed Mr. Bertrand as their arbitrator, and, the proprietors having failed to appoint one on their behalf, a petition was presented to the judge of the Superior Court in a case No. 4573 requesting the appointment of an arbitrator on behalf of the other parties.

On July 21, 1911, the Court by consent appointed Mr. St. George on behalf of the appellants, and the two arbitrators appointed Mr. St. Laurent as the third arbitrator in accordance with the Code. The arbitrators proceeded with their work, and on November 27, 1911, made the award which is in question in these proceedings. It is in these terms : " We the undersigned, the arbitrators appointed in this case, No. 4573, after having examined and valued the property, and heard the parties and their witnesses, under oath administered by one of us, do hereby certify that we award to the respondents the

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sum of seventy-five thousand seven hundred (75,700) dollars, to be paid by the petitioner in full compensation for the expropriation of the property expropriated by the said petitioner. Arthur St. Laurent, Percival W. St. George.

"I cannot agree with above award.

"J. T. Bertrand."

Except so far as the No. 4573 introduces into this award the details of the process to which it is a reference, it is plain that the award does not comply with the provisions of art. 5798 of the Revised Statutes in several material respects, and this was made one of the grounds of objection to the award on the part of the city; but it is not material to consider the effect of the omissions, for, even if this objection were maintained, the award could be remitted to the arbitrators to supply the necessary statements, and the substance of the award would remain. The real ground upon which the award is challenged is far more serious, and it is that the arbitrators have exceeded their jurisdiction and assessed the valuation on a totally wrong basis. There is nothing to support this contention on the face of the award; but in the course of the proceedings Mr. St. Laurent was called as a witness, and he produced a long and very elaborate system of notes of the evidence that he had taken and the calculations that he had made in order to arrive at his figures. (1) He divided the subject-matter into two heads—the value of the lands and the water power in the physical condition in which they were found at the date of the valuation, and the value of the possibilities of development of those waterfalls by storing and regulating the waters through the medium of reservoirs. In doing this, their Lordships are of opinion that he was clearly right. The possibility of an added utility for any expropriated property due to existing possibilities of development is, subject to limits to which their Lordships will refer, a right and proper subject for consideration in ascertaining the compensation to be paid on expropriation. But in the method which was adopted by Mr. St. Laurent for arriving at what he regarded as the measure of this compensation he did not, in their Lordships' opinion, fix, as he was bound to do, the value of the immovable he was appointed

(1) The witness was called by the plaintiffs (owners), and the notes were put in upon his examination-in-chief.

to determine, but the value of another thing which was altogether outside his powers.

It is unnecessary to examine the evidence upon this point in close detail, because the statement of Belleau J. in the Superior Court in these words—" Ils ont, comme dans la cause citée plus haut (1), commis l'erreur de faire participer l'expropriée aux bénéfices de la plus-value, donnée à la propriété, par la réalisation de l'objet pour lequel acquisition en était faite. Ils font payer à la ville, non pas la valeur d'un pouvoir d'eau pouvant développer 300 h.p., qui est ce que les propriétaires vendent, mais moitié de la valeur d'un pouvoir additionnel de 1200 h.p., qui est ce que la ville doit réaliser par l'exécution des travaux qu'elle a en vue ou en voie d'exécution. Ce n'est plus la valeur pour le propriétaire qui vend, mais la valeur pour celui qui achète, calculée sur le bénéfice qu'il doit retirer de l'exploitation à laquelle il destine la propriété expropriée. Le vendeur reçoit plus qu'il ne donne, il partage dans ce que la propriété vaut pour l'acheteur. Voilà ce qu'est l'indemnité que la ville est appelée à payer. Je répète que le principe est faux et qu'il vicie les procédés des arbitres"—and that of the Chief Justice—" On voit par les notes du tiers arbitre, Arthur St. Laurent, de quelle manière il a procédé. Il a commencé par calculer le revenu annuel que donneront les 1200 forces nouvelles du pouvoir des Grandes Chutes, et il est arrivé à la conclusion que ce revenu serait de 25,850 dollars; puis il a retranché de ce montant une somme de 23,875 dollars pour frais d'exploitation, intérêt sur montant déboursé par la cité, fonds d'amortissement et part raisonnable de la cité dans les profits; ce qui laissait une balance de 1975 dollars. Il a accordé cette balance de revenu aux expropriés comme étant la part qui devait leur revenir dans les profits, et il a capitalisé ce revenu à 5 pour cent, ce qui forme un capital de 39,500 dollars. C'est ce dernier montant que les arbitres ont accordé aux expropriés comme indemnité pour la valeur potentielle des Grandes Chutes"—are in effect concurrent findings of fact, which there is abundant evidence to support, that in truth the value which Mr. St. Laurent fixed was the value of the property to the person who was buying, and not to the person who was selling, and it was not this value that he was appointed to determine.

(1) *Cedars Rapids Manufacturing & Power Co. v. Lacoste.*

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The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board* (1), *Cedars Rapids Manufacturing & Power Co. v. Lacoste* (2), and *Sidney v. North Eastern Ry. Co.* (3) The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this : that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported.

Their Lordships desire to add that it is plain, from the language of the statute making the award of arbitrators final and without appeal, that, apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed. Their findings of fact and their findings of value, unless it be shown that the value is not that which they were appointed to determine, are free from challenge.

The appellants have urged that in the present case, if the award is found to be bad, the matter should be sent back to the arbitrators to be reheard. It is quite possible that this is the proper course to pursue. It may be that the arbitrators are not deprived of their office by what has occurred, that they have merely done an informal and an invalid act, but this is essentially a question which ought primarily to be considered in the Courts of Quebec, and it does not appear to have been the subject of any close examination in any of the judgments which have been passed in these proceedings. It may well be that there is a recognized and established method of dealing with such cases acted on in those Courts, and without knowledge on this point their Lordships do not think it right to express any opinion at all upon the question as to whether the arbitrators can now proceed to make a new award, or whether

(1) [1909] 1 K. B. 16.

(2) [1914] A. C. 569.

(3) [1914] 3 K. B. 629.

they have no longer any authority to act. Their Lordships will accordingly humbly advise His Majesty that these appeals fail and must be dismissed with costs.

Solicitors for appellants : *Stephenson, Harwood & Co.*

Solicitors for respondent : *Lawrence Jones & Co.*

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## [PRIVY COUNCIL.]

CANADIAN PACIFIC RAILWAY COMPANY . APPELLANTS ;

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PARENT AND ANOTHER . . . . . RESPONDENTS.

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## ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada—Conflict of Laws—Death by Negligence—Lex Loci—Conditions in Railway Pass—Approval of Railway Board—Railway Act (R. S. Can., 1906, c. 37), s. 340—Fatal Accidents Act (1 Geo. 5, c. 33, Ontario)—Civil Code of Lower Canada, art. 1056.*

A man domiciled in Quebec, while travelling on the appellants' railway in charge of cattle, was killed in Ontario by the negligence of the appellants' servants. The cattle were consigned by the employers of the deceased man under the appellants' form of live stock contract, which provided that if a man was allowed to travel in charge of the cattle at less than full fare the appellants were to be under no liability for his death, injury, or damage, whether caused by negligence or otherwise. A pass at less than full fare was issued to the deceased, who placed his signature below conditions printed thereon. One of the conditions was that the appellants should be entirely free from liability for any damage, injury, or loss to the deceased, whether caused by negligence or otherwise. The form of the live stock contract had been approved by the Railway Board under s. 340 of the Railway Act, but the form of the pass had not been specifically so approved.

The widow of the deceased sued the appellants in Quebec for damages under art. 1056 of the Civil Code of Lower Canada. Under the Fatal Accidents Act (1 Geo. 5, c. 33, Ontario) she could not have maintained an action in Ontario if her husband would have

\* *Present* : VISCOUNT HALDANE, LORD DUNEDIN, LORD PARKER OF WADDINGTON, LORD PARMOOR, and LORD WRENBURY.



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been precluded by his contract from doing so ; the cause of action under art. 1056 is not thus limited :—

*Held*, (1.), that, upon the evidence, the deceased must be taken to have assented to the condition in the pass ; (2.) that the approval of the Railway Board to the form of the live stock contract validated the form of the pass ; (3.) that upon the principles of private international law the appellants were under no common law liability in Quebec, since they were neither civilly nor criminally liable in Ontario ; (4.) that the presumption was that art. 1056 applied only to offences or quasi-offences committed within the legislative jurisdiction of that province, and there was no sufficient ground for holding that it had a wider effect.

APPEAL by special leave from a judgment of the Supreme Court of Canada (March 15, 1915) affirming the judgment of the Court of King's Bench of Quebec, Appeal Side (November 12, 1914), which affirmed the judgment of Lemieux C.J. at the trial.

The first respondent, the widow of Joseph Chalifour, on behalf of herself and as tutrix of her four infant children, sued the appellants in the Court of King's Bench of Quebec. The action was brought under art. 1056 of the Civil Code of Lower Canada to recover damages occasioned by the death of Joseph Chalifour owing to the negligence of the appellants. The deceased man, who was domiciled in Quebec, was killed while travelling through Ontario ; the facts relating to the contract under which the deceased was carried are stated in the judgment of their Lordships. The negligence was admitted, but the appellants by their plea relied on the contract of carriage as exempting them from all liability for negligence. By their amended plea they pleaded that their liability to the deceased, and their responsibility to his widow, were governed by the law of the Province of Ontario, where the offence or quasi-offence upon which the action was founded was alleged to have been committed, and that by the law of Ontario (as contained in the Fatal Accidents Act (1 Geo. 5, c. 33) of that province) the plaintiff had no right of action, since, if the deceased had survived he would have had none by reason of the terms under which he was carried. It was not disputed in the course of the proceedings that, in accordance with the decisions of the Privy Council in *Robinson v. Canadian Pacific Ry. Co.* (1) and *Miller v. Grand Trunk Ry. Co.* (2), if the accident had occurred in Quebec the widow would have been entitled to maintain

(1) [1892] A. C. 481.

(2) [1906] A. C. 187.

an action under art. 1056 although her husband would have been precluded by his contract from suing for injuries.

The trial judge (Lemieux C.J.) gave judgment against the appellants for 5000 dollars, and the Appeal Side affirmed the decision in a judgment delivered by Cross J. and reported at Q. R. 46 S. C. 319.

An appeal to the Supreme Court of Canada was dismissed by Davies, Idington, Duff, Anglin, and Brodeur JJ., Fitzpatrick C.J. dissenting. The majority, excepting Anglin J., held that the deceased had not assented to the conditions. Davies J. held that the approval of the Railway Board to the terms of the live stock contract under s. 340 of the Railway Act extended to the form of the pass, but Duff J. (with whose judgment Brodeur J. concurred) was of opinion that it did not. Anglin J. held that the condition in the pass was authorized by the Railway Board and was assented to by the deceased. He, however, held that the action was nevertheless maintainable in Quebec upon the authority of *Machado v. Fontes* (1); in his view the present case was stronger, the cause of action being one of a class recognized by the law of Ontario, the remedy only being barred. The learned Chief Justice dissented, holding that the condition was binding upon the deceased and that the right of action must be determined by the law of Ontario. The judgments are reported at 51 Can. S. C. R. 234.

1916. Dec. 14, 15, 18. *P. O. Lawrence, K.C., G. G. Stuart, K.C., and Hon. M. Macnaghten* (for *G. Lawrence*, serving with His Majesty's Forces), for the appellants. The action is not maintainable under art. 1056 of the Civil Code, under which article it was brought. That article is one of a group dealing with offences and quasi-offences, and should be construed as relating only to offences and quasi-offences arising in the province. If, however, the article has a wider operation, the question is whether there was any offence or quasi-offence; that must depend upon the law of Ontario, the locus ubi actus. The deceased by signing the pass must be taken to have assented to the condition exempting the appellants from all liability: *Grand Trunk Ry. Co. v. Robinson*. (2) The Railway Board approved the form of the live stock contract

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(1) [1897] 2 Q. B. 231.

(2) [1915] A. C. 740.

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under s. 340 of the Railway Act, and thereby "authorized or approved" the form of the pass issued in pursuance of the contract. The cause of action under the Fatal Accidents Act of Ontario (1 Geo. 5, c. 33) is a separate cause of action from that which the deceased would have had, and does not arise at all unless the deceased could have maintained an action: *British Columbia Electric Railway v. Gentile*. (1) The judgment of the Board in *Grand Trunk Ry. Co. v. Robinson* (2) shows that, as the effect of the condition in the pass, the appellants owed no duty to the deceased; if there was no duty there was no tort. The decision in *Machado v. Fontes* (3) does not apply, first, because the cause of action here is purely statutory; secondly, because there was no criminal liability of the appellants in Ontario. If the law of Manitoba, the locus ubi contractus, is to be considered, the Court was bound to take cognizance of the law of that province without evidence: *Cooper v. Cooper* (4); *Logan v. Lee*. (5) The law in Manitoba, as enacted by R. S. Man., 1902, c. 31, is the same as that of Ontario.

*Sir J. Simon, K.C.*, and *Savard*, for the respondents. Art. 1056 of the Civil Code cannot be limited in effect to offences or quasi-offences arising in the province. Numerous actions have been maintained in Quebec under the Civil Code in respect of torts committed outside the province—e.g., *Glasgow and London Insurance Co. v. Canadian Pacific Ry. Co.* (6), *Dupont v. Quebec Steamship Co.* (7), and *Logan v. Lee*. (5) Even assuming that the conditions in the contract and pass were binding upon the deceased, the action is maintainable. An action is maintainable in respect of an act done in another jurisdiction if the act is actionable under the lex fori and is not an "innocent" act according to the lex loci: per Rigby L.J. in *Machado v. Fontes*. (3) [Reference was also made to *Phillips v. Eyre* (8), *The M. Moxham* (9), *Scott v. Lord Seymour* (10), *Grand Trunk Railway v. Marleau* (11), and Dicey's Conflict of Laws, 2nd ed., pp. 645, 708, 710.] The cause of action

(1) [1914] A. C. 1034.

(2) [1915] A. C. 740.

(3) [1897] 2 Q. B. 231.

(4) (1888) 13 App. Cas. 88.

(5) (1907) 39 Can. S. C. R. 311.

(6) (1888) 34 Lower Canada

Jurist, 1.

(7) (1896) Q. R. 11 S. C. 188.

(8) (1870) L. R. 6 Q. B. 1, 29.

(9) (1876) 1 P. D. 107.

(10) (1862) 1 H. & C. 219.

(11) (1911) Q. R. 21 K. B. 269.

arose out of the negligence of the appellants, which was not an "innocent" act. Even if there was no civil liability in Ontario, there was criminal liability; in considering whether the act was an innocent act it is not material that that liability was only upon the appellants' servants. Further, the fact that the deceased had contracted to exempt the appellants from liability does not render the negligence an innocent act.

The conditions in the contract and pass, however, were not binding upon the deceased. This case differs from *Grand Trunk Ry. Co. v. Robinson* (1), in which the form of the live stock contract was held to have been validly approved by the Railway Board under s. 340 of the Railway Act (R. S. Can., 1906, c. 37). In that case the only contract to carry the deceased person was contained in the live stock contract; no pass was issued. In this case, the journey being east of Winnipeg, the stockman was bound to have a separate pass which alone constituted the contract with him for his conveyance. The form of the pass was not approved by the Railway Board as required by s. 340. The approval of the form of the live stock contract does not involve approval of the form of the pass. The first is a contract with the consignor, and different considerations would apply to the conditions limiting liability to the stockman personally. Further, the condition in the pass is differently worded in that it does not refer to death. Lastly, the deceased was not bound by the condition in the live stock contract to which he was not a party, and, having regard to his illiterate character, he cannot be held to have had knowledge that the pass contained conditions, or to have assented to them: *Richardson, Spence & Co. v. Rowntree*. (2)

A reply was not called for.

1917. Jan. 26. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This appeal raises questions of importance on which there has been considerable divergence of opinion among the learned judges in the Courts below. Those Courts have, however, for varying reasons, agreed in holding that the Chief Justice of Quebec, who tried the case, was right in his decree that the respondents were entitled to damages from the appellants for having by

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(2) [1894] A. C. 217.



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the negligence of their servants caused a collision which resulted in the death of one Joseph Chalifour.

As certain of the points of law decided were of general interest to the public in Canada, their Lordships gave special leave to appeal, but only on terms as to costs.

The important facts in the case are not in dispute; the real questions are questions of law. The respondents are the widow and son (1) of Joseph Chalifour. He was a stockman employed by the Gordon Ironside and Fares Company, Limited, to bring cattle by the appellants' railway from Winnipeg in Manitoba to Hochelaga, a suburb of Montreal in Quebec. The cattle were consigned to the appellants under a "live stock special contract" dated September 18, 1911, which contained a provision exempting the appellants from all liability in respect of the death, injury, or damage of a person travelling with the cattle, in case a pass had been granted to him to travel at less than full fare for the purpose of taking care of them, whether such liability was caused by the negligence of the appellants or their servants or otherwise. Chalifour had signed a separate pass which for all material purposes repeated this exemption from liability as regarded himself individually. On September 21, 1911, while on the journey from Winnipeg to Hochelaga, Chalifour was killed in a collision at Chapleau in Ontario. The collision was due to negligence on the part of the appellants' servants.

By art. 1056 of the Civil Code of Quebec it is provided that "in all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death." It is settled by the decisions of this Board in *Robinson v. Canadian Pacific Ry. Co.* (2) and *Miller v. Grand Trunk Ry. Co.* (3) that this article of the Code confers an independent and personal right, and not one conferred, as in the English statute known as Lord Campbell's Act, merely on the representatives as

(1) The son attained his majority during the proceedings in

Canada, and was joined as a

plaintiff.

(2) [1892] A. C. 481.

(3) [1906] A. C. 187.

such of the deceased. In Manitoba and Ontario it is otherwise. The analogous right there arises only under statutes which are for this purpose substantially in the same terms as Lord Campbell's Act. There was some doubt expressed in the Courts of Quebec in the present case as to whether the law of Manitoba, assuming it to be relevant, was duly proved. If such proof was material in the Quebec Court, their Lordships are of opinion that, when the case reached the Supreme Court of Canada, this doubt could not properly be entertained. For the Supreme Court is the common forum of the provinces of Canada, and is bound to take judicial notice of their laws. It is clear that if the law of either Manitoba or Ontario governs the case the respondents were precluded from claiming.

In these provinces the rule of the English common law prevails that in a civil Court the death of a human being cannot be complained of as an injury. The application of this rule is modified by statute in a fashion analogous to what obtains in England under Lord Campbell's Act; but the modification contained in the statutes in these provinces has, like that contained in Lord Campbell's Act, no application unless the wrongful act done would, had not death ensued, have entitled the person injured to maintain an action and recover damages. If Chalifour validly contracted himself out of this right, his representatives could not therefore have sued if the law of either of these provinces governs.

The crucial questions which arise are whether Chalifour, by signing the pass under the circumstances in which he was accepted as a passenger in charge of the cattle at less than the full fare, bound himself to renounce what would otherwise have been his rights, and, if so, whether the respondents were precluded from claiming under the article in the Quebec Code. If that article applied, it is not in controversy that the widow and son were proper plaintiffs in this action.

Dealing with the first of these questions, their Lordships have arrived at a conclusion different from that of the majority in the Supreme Court of Canada. Sect. 340 of the Railway Act of the Dominion provides that "no contract, condition, bye-law, regulation, declaration, or notice made or given by the company, impairing, restricting, or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company

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from such liability, unless such class of contract, condition, bye-law, regulation, declaration, or notice shall have been first authorized or approved by order or regulation of the Board." By sub-s. 2 "the Board may, in any case or by regulation, determine the extent to which the liability of the company may be so impaired, restricted, or limited." By sub-s. 3 "the Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company." It appears that in 1904 the appellants applied to the Board for approval of their forms of bills of lading and other traffic forms. At the time they and three others were the only railway companies that had thus complied with the requirements of the Act, and there was much diversity in the forms used by different companies. The Board therefore abstained from making any final or definite order on the subject, but made an interim order, the effect of which was to permit the appellants to continue the use of their present forms until otherwise directed. Among the forms so authorized was that in which the "live stock special contract" in the present case was made. One of its clauses provided that "In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then, as to every person so travelling on such a pass or privilege less than full fare, the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company or its servants or employees or otherwise howsoever."

On the same date as the live stock contract was made, on September 18, 1911, a pass was issued to Chalifour and a man named Adshead, who were the nominees of the Gordon Ironside and Fares Company, Limited, the shippers under the special live stock contract. The pass was headed "Live Stock Transportation Pass" and was in the following form:—

"Winnipeg, September 18, 1911.

"To conductors.

"The two men whose signatures are subscribed on back hereof are the only persons entitled to pass in charge of thirteen cars live stock" (the identification numbers being stated). "Billed

from Cardston to Montreal. As men in charge of live stock are now only passed to Winnipeg on stock contracts, conductors east of Winnipeg will not honour stock contracts for passage. Conductors in charge of train making last run will take up this pass and turn it to agent at destination of live stock.

“Valid only when countersigned by R. E. Larmour, General Freight Agent.

“Conditions.

“Each of us, the undersigned, having charge of live stock mentioned on face hereof, in consideration of the conditions of the Canadian Pacific Railway Company’s live stock transportation contract, agree with the company, while travelling on this pass, to assume all risk of accident or damage to person or property, and that the company shall be entirely free from all liability in respect to any damage, injury, or loss to any of us or the property of any of us, whether such accident, injury, damage, or loss is caused by the negligence of the company or its servants or employees or otherwise howsoever.”

The signatures of Adshead and Joseph Chalifour appeared below the conditions, being witnessed by H. de Villers, and the pass and conditions were each countersigned by H. W. Dickson, local freight agent.

Their Lordships are of opinion that if this document was signed by Chalifour under such circumstances as to make it binding on him it relieved the company effectually from all liability for damages caused to him by the accident which happened. The Railway Board had approved the condition in the main contract by which, if the company granted a pass at less than full fare to a nominee, such as was Chalifour, it was to be free from all liability. No doubt this condition was contained in a contract made only between the company and the shippers. But it was inserted to regulate the terms on which the nominee, if allowed to travel, was to be accepted, and the nominee, if he validly signed the pass in which its substance was repeated, accepted these approved terms as definitive of the footing on which he was to be carried. In this respect there is no real distinction between the facts and those in *Grand Trunk Ry. Co. v. Robinson* (1), where the pass was written on the same paper as

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the contract. All that s. 340 of the Railway Act requires is that the class of condition should have been approved by the Board, and such approval was obviously given in the present case. Their Lordships are unable to agree with the reasons given in the judgment of Duff J. in the Supreme Court of Canada for thinking that what was done did not comply with all that s. 340 required.

The next question to be considered is whether the appellants have discharged the burden of proving that Chalifour assented to the special terms on which he was invited to travel. The evidence on this point is somewhat meagre. No witness has any exact recollection of what took place. Chalifour understood but little English, and he could not read or write, though he could sign his name. He had been for two years in the employment of the shippers to look after stock ; but he had not been in Western Canada prior to the occasion on which the particular journey was made, and on which his death took place. Before that he had worked in a brewery, apparently in Quebec. It was proved that the appellants kept a French clerk, whose duty it was to give explanations to any nominee who was called on to sign his pass and asked for explanations. This clerk was named de Villers, and he witnessed the signature of Chalifour. He could not remember whether or not he had been asked for any explanation of the conditions ; but another clerk, named Anderson, says that he remembers a conversation in French taking place, on the occasion of the pass being signed, between Chalifour and de Villers. He knew Adshead and recalled what took place. The pass, after being signed by Adshead and Chalifour, was delivered to Adshead, who was present, along with the latter, when it was given out. Adshead himself was not called as a witness by either party. Under the circumstances their Lordships are not satisfied that, as was held in *Grand Trunk Ry. Co. v. Robinson* (1), the company was not entitled to infer that Chalifour left it to Adshead to make the bargain for him. But it is unnecessary to decide this. For they think that, having regard to the general course of business and to the exigencies of time and place, the company did enough to discharge the obligation that lay on them to enable Chalifour to know what he was about when he accepted the pass containing the condition to which he signed his name. They are unable to concur

(1) [1915] A. C. 740.

with the learned judges in the Courts below, who have held that more was required to be done by the company in order to make it reasonable to infer that Chalifour knew, or ought to have known, what he was assenting to when he signed the document. As was pointed out in the judgment of the Judicial Committee in *Grand Trunk Ry. Co. v. Robinson* (1), the duty of railway companies to reduce delay when serving the public has to be borne in mind in estimating what the law will require in practice.

It follows that, as the statute law of Ontario, the province where the accident occurred which caused Chalifour's death, did not confer on any one claiming on his account a statutory right to sue, there was, so far as Ontario is concerned, no other right. For in Ontario the principle of the English common law applies, which precludes death from being complained of as an injury. If so, on the general principles which are applied in Canada and this country under the title of private international law, a common law action for damages for tort could not be successfully maintained against the appellants in Quebec. It is not necessary to consider whether all the language used by the English Court of Appeal in the judgments in *Machado v. Fontes* (2) was sufficiently precise. The conclusion there reached was that it is not necessary, if the act was wrongful in the country where the action was brought, that it should be susceptible of civil proceedings in the other country, provided it is not an innocent act there. This question does not arise in the present case, where the action was brought, not against the servants of the appellants, who may or may not have been guilty of criminal negligence, but against the appellants themselves. It is clear that the appellants cannot be said to have committed in a corporate capacity any criminal act. The most that can be suggested is that, on the maxim *respondeat superior*, they might have been civilly responsible for the acts of their servants.

The other point that remains is whether art. 1056 of the Quebec Code which has already been quoted conferred a statutory right to sue in the events which happened. Their Lordships answer this question in the negative. The offence or quasi-offence took place not in Quebec but in Ontario. The presumption to be made is that in enacting art. 1056 the Quebec Legislature meant, as an Act of the

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(2) [1897] 2 Q. B. 231.

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Imperial Parliament would be construed as meaning, to confine the special remedy conferred to cases of offences or quasi-offences committed within its own jurisdiction. There is, in their Lordships' opinion, nothing in the context of the chapter of the Code in which the article occurs which displaces this presumption in its construction. The rule of interpretation is a natural one where law, as in the case of both Quebec and England, owes its origin largely to territorial custom. No doubt the Quebec Legislature could impose many obligations in respect of acts done outside the province on persons domiciled within its jurisdiction, as the railway company may have been by reason of having its head office at Montreal. But in the case of art. 1056 there does not appear to exist any sufficient reason for holding that it has intended to do so, and by so doing to place claims for torts committed outside Quebec on a footing differing from that on which the general rule of private international law already referred to would place them.

In the result their Lordships will humbly advise His Majesty that the judgment appealed from should be reversed and that the action should be dismissed. As leave to appeal to His Majesty in Council was given only upon the special terms that the costs of the appeal as between solicitor and client should be borne by the appellants in any event, this must be done. As to the costs in the Courts below, their Lordships think that under the circumstances which attend this appeal the parties ought to bear their own costs in those Courts. The effect of this will be that any costs already paid by the appellants to the respondents must be refunded.

Solicitors for appellants : *Blake & Redden.*

Solicitors for respondents : *Lawrence Jones & Co.*

## [PRIVY COUNCIL.]

MOEAPITSO BATHOVEN . . . . . PETITIONER ;

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AND

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THE KING . . . . . RESPONDENT.

Feb. 2.

*Bechuanaland Protectorate—Special Court—Jurisdiction—“Cases pending”—Proclamation No. 40 of 1912, s. 1, sub-s. 2 (c).*

By Bechuanaland Proclamation No. 40 of 1912, s. 1, there was established a Court to be called the Special Court for the Bechuanaland Protectorate, and it was provided by s. 1, sub-s. 2 (c), that the Court so established should have jurisdiction in “such cases pending in the Court of the Resident Commissioner, or in the Court established under s. 4 of Proclamation No. 2 of 1896, as such Court may on its own mere motion remove to the said Special Court” :—

*Held*, that the jurisdiction of the Special Court was not confined to cases pending before the Courts named at the date of the Proclamation.

PETITION for special leave to appeal from a judgment of the Special Court of the Bechuanaland Protectorate convicting the petitioner of murder and sentencing him to death.

The petitioner was a native residing at Kanye in the Bechuanaland Protectorate. In September, 1916, he was indicted at Lobatsi, before a Court appointed by the Resident Commissioner under s. 4 of Proclamation No. 2 of 1896, for the murder of a native chief. The Court ordered the case to be removed to the Special Court constituted under Proclamation No. 40 of 1912.

At the trial objection was taken to the jurisdiction of the Special Court on the ground that s. 1, sub-s. 2 (c), set out in the head-note, of Proclamation No. 40 of 1912 referred only to cases pending at the date of the Proclamation. The objection was overruled, and leave to appeal to His Majesty in Council refused. The petitioner was tried and found guilty ; he was sentenced to death.

1917. Feb. 2. *Comyns Carr*, for the petitioner. The words “cases pending” in s. 1, sub-s. 2 (c), of Proclamation 40 of 1912 mean pending at the date of that Proclamation. The provision

\* *Present* : LORD FINLAY L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.



J. C. was of a transitory nature. If the words are construed as applying  
1917 to cases pending at any time, then as to Europeans charged with  
MOEAPITSO murder the jurisdiction given by s. 1, sub-s. 2 (b), overlaps the  
BATHOVEN jurisdiction by transfer under s. 1, sub-s. 2 (c), and Proclamation 2  
v.  
REX. of 1896, s. 4. Sect. 6 of Proclamation 40 of 1912 does not apply  
because this was not a case excluded from the jurisdiction of the  
Court by the Proclamation.

*Sir Frederick Smith, A.-G., and Branson*, for the Crown, were not called upon.

The judgment of their Lordships was delivered by

LORD FINLAY L.C. The question raised by this petition is as to the meaning of the words "cases pending" in s. 1, sub-s. 2 (c), of Bechuanaland Proclamation 40 of 1912. The words are apt words to make the provisions of the sub-section apply to cases which should at any time be pending before the Courts mentioned. Their Lordships cannot find anything in the provisions of the Proclamation which makes it appear that the words were intended to have a more restricted meaning. They will therefore humbly advise His Majesty that this petition should be dismissed.

Solicitors for petitioner : *Budd, Johnson & Jecks.*

Solicitor for the Crown : *Treasury Solicitor.*

## [PRIVY COUNCIL.]

HAJI ABDUL RAHMAN AND ANOTHER . . . APPELLANTS ;  
 AND  
 MAHOMED HASSAN . . . . . RESPONDENT.

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Feb. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR THE  
 FEDERATED MALAY STATES.

*Registration of Titles—Mortgage—Statutory Form—Unregistered Agreement—Contractual Right—(Selangor) Registration of Titles Regulation (IV. of 1891), ss. 4, 41—(Selangor) Limitation Enactment (V. of 1896), Sched. II., art. 115.*

A system of registration of titles founded on the Torrens system and contained in the (Selangor) Registration of Titles Regulation, 1891, is in force in the Federated Malay State of Selangor. That Regulation provides by s. 4 that land shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with, except in accordance with the Regulation; and by s. 41 that whenever any land is intended to be charged, or made security, the proprietor shall execute a charge in the prescribed form, which must be registered. By the (Selangor) Limitation Enactment, 1896, Sched. II., art. 115, a suit against a mortgagee to redeem immovable property mortgaged may be commenced within sixty years of the accrual of the right to redeem.

An agreement in writing made in 1895 provided that, as security for a debt, land in the State of Selangor of which the debtor was registered as owner should be transferred to the creditor, and that it should be a condition of the agreement that if the debtor repaid the debt within six months the land should be reconveyed to him, otherwise the agreement should be void. A transfer of the land to the creditor in the form provided by the Regulation was executed upon the execution of the agreement and was duly registered. In 1913 the debtor, who had not repaid the debt, sued to redeem the land. The suit was barred by the Limitation Enactment, 1896, unless the agreement was a mortgage to which art. 115, above referred to, applied :—

*Held*, that, having regard to s. 4 of the Registration of Titles Regulation, 1891, the agreement conferred upon the debtor no real right in the land, but merely a contractual right, and that art. 115 of Sched. II. of the Limitation Enactment applied only

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\* *Present* : LORD BUCKMASTER, LORD DUNEDIN, LORD PARMOOR, and SIR WALTER PHILLIMORE, BART.

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where the relationship of mortgagor and mortgagee was created by a charge made and registered in accordance with the Regulation ; that consequently, even if the agreement should be construed as a continuing security for the debt, the suit was barred by the Limitation Enactment.

APPEAL from a judgment of the Court of Appeal for the Federated Malay States (January 5, 1914) affirming the Court of the Judicial Commissioner for the State of Selangor.

The facts, and the effect of the decisions in Selangor, appear from the judgment of their Lordships, in which also the material statutory provisions are set out.

1917. Jan. 25. *Alexander Grant, K.C.*, and *J. E. Hogg*, for the appellants. The questions in this case depend solely upon the enactments in force in the State of Selangor. The Federated Malay States are not British colonies, but independent States under British protection ; the doctrines of English equity therefore have no application there : at any rate, those doctrines cannot be applied to alter the land system established in the State by the Registration of Titles Regulation, 1891. Having regard to ss. 4 and 41 of that Regulation, the agreement of March 1, 1895, gave rise only to a right in contract and not to any real right against the land. [Reference was also made to the definition of "charge" in s. 2, and to ss. 7, 8, 9, 11, 21 (which excludes the doctrine of notice), 25, 68 (as to caveats).] If upon the true construction of the agreement there was a right to a reconveyance upon payment of the debt after the six months, that was a right in contract. The suit is consequently barred under the (Selangor) Limitation Enactment, 1896, Sched. II., art. 92, or art. 112. Art. 115 no doubt provides a period of sixty years in the case of a suit against a mortgagee to redeem land mortgaged. That article only applies where the relationship of mortgagor and mortgagee has been created by a charge made and registered in accordance with the Regulation. The Limitation Enactment is framed on the Indian Limitation Act, 1877, the word "mortgage" being left in art. 115 though not strictly applicable. [Reference was also made to the (Selangor) Specific Relief Enactment (IX. of 1903), s. 4.]

The respondent did not appear.

Feb. 19. The judgment of their Lordships was delivered by

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LORD DUNEDIN. In this suit the plaintiff, Mahomed Hassan, claimed to be entitled as against the defendant, Haji Mahomed Eusop (now represented by the appellants), to a piece of land in Kuala Lumpur, held under certificate of title 626. The land originally belonged to a Mr. Keyser, who in 1893, through his attorney, sold it to the plaintiff, and the land was transferred to the plaintiff in August, 1894. The plaintiff had originally paid for the land by granting a promissory note in favour of Mr. Keyser's attorney. The plaintiff being unable to discharge the note, the defendant consented to become surety for him, and for the promissory note of the plaintiff there was substituted a joint note of the plaintiff and defendant. In February, 1895, the joint note was discharged by the defendant, who paid up the amount due on principal and interest. At the same time the defendant paid off the amount due by the plaintiff upon two decrees. The total advances thus made by the defendant to the plaintiff amounted to 1180 dollars. On March 1, 1895, the plaintiff transferred the land to the defendant by a registered transfer for the consideration of 1180 dollars, and upon the same date the parties executed the following agreement : " This agreement made March 1, 1895, between Mahomed Hassan, of Kuala Lumpur, broker, of the one part, and Haji Mahomed Eusop, also of Kuala Lumpur, merchant, of the other part : whereas the said Mahomed Hassan is justly indebted unto the said Haji Mahomed Eusop in the sum of 1180 dollars, which he is unable to pay at present ; and whereas for securing the repayment of the said sum of 1180 dollars he, the said Mahomed Hassan, has this day transferred unto the said Haji Mahomed Eusop his land at Batu Road in Kuala Lumpur, comprised in certificate of title No. 626, containing an area of 3 roods and 21.7 perches. Now the condition of this agreement is such that if the said Mahomed Hassan shall within six calendar months from the date hereof pay unto the said Haji Mahomed Eusop, or his executors or administrators, the said sum of 1180 dollars, together with interest thereon from the date hereof at the rate of 18 per cent. per annum, plus the sum of 33 dollars, being the cost of drawing this agreement and the transfer above named, including stamp and registration fees, then the said Haji Mahomed Eusop shall at the cost of the said Mahomed Hassan



J. C. reconvey the said land so described above unto the said Mahomed  
 1917 Hassan free from incumbrances, otherwise this agreement shall  
 become null and void and of no effect."

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 —

The agreement was duly signed and sealed. Since that date the defendant, who had obtained registration under the document of transfer, has remained the registered owner of the land. The plaintiff in his pleadings, *inter alia*, averred adverse possession of the land, but this, as a fact, was found against him and need be no longer referred to. The defendant denied that he had executed the agreement; the plaintiff swore he had repaid the money; both these averments were false. It is enough to cite one sentence from the judgment of Innes J., before whom the action depended: "His" (the plaintiff's) "fatuous mendacity in insisting that he had paid it by that date almost parallels that employed by the defendant in his repudiation of the execution of the agreement." No reliance can be placed on the word of either party, but the documents speak for themselves. The learned judge found as a fact that the agreement was executed by the defendant, and that the plaintiff never paid the money. These two facts being held as proved, as to which there is not a shadow of doubt, there is fortunately no occasion to rely on the testimony of either party. The question remains one of law alone.

Payment being negatived, the claim of the plaintiff was confined to asking a declaration that he was still entitled to redeem the land, and that after inquiry as to the amount of the debt with interest, and upon payment of the sum due, the plaintiff should be entitled to a reconveyance. This relief was granted by the trial judge, and his judgment was affirmed by the majority of the Court of Appeal. Against these judgments the present appeal was taken. The defendant having died, his legal representatives were substituted for him in the appeal.

Before the trial judge the argument of parties seems to have been as follows: The plaintiff argued that the agreement, on a proper construction, proved that what was *ex facie* an out-and-out transfer, evidenced by the registered title, was in reality only a conveyance in security, and that he was therefore entitled, on paying the debt to get a reconveyance of the land. To this the defendant made several replies. First, he said that on a true construction the

agreement showed, not a conveyance in security, but a transfer with a conditional contract for resale, a *pactum de retrovendendo*, and that, payment not having been made within the time stipulated, there was no obligation to reconvey. He also pleaded that if the agreement on construction showed a conveyance in security, then it was null and void in terms of s. 4 of the Registration of Titles Regulation, 1891. He also pleaded that any action founded on the agreement was barred by the Limitation Enactment of 1896.

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The learned trial judge in his judgment examines at some length the cases which have been decided in England and which go to affirm the proposition which is expressed in the brocard "once a mortgage always a mortgage," and comes to the conclusion that the agreement in question on a proper construction shows that the transaction was one of conveyance in security, and not of transfer with appended *pactum de retrovendendo*. To this view he has the adherence of the majority of two learned judges of the Court of Appeal. The dissenting judge, Woodward J., in the Court of Appeal thought that the agreement was a *pactum de retrovendendo* conditioned by payment within the stipulated time of six months.

In the view that their Lordships take of this case it is unnecessary to decide this question, and they assume, without deciding, that the construction put upon the particular document by the majority of the learned judges is the correct one. The next point, therefore, comes to be whether the agreement, if showing a conveyance in security, is null and void in respect of s. 4 of the Registration of Titles Regulation, 1891. The land system of the State of Selangor, in which the land in dispute is situated, is a system of registration of title modelled on the well-known Torrens system of Australia. It is unnecessary to describe it in detail; the law thereupon is contained in the Act cited, which forms a code on the subject. Sect. 4 is as follows: "After the coming into operation of this Regulation, all land which is comprised in any grant . . . whether issued prior or subsequent to the coming into operation of this Regulation, shall be subject to this Regulation and shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Regulation, and every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall

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be null and void and of none effect, and in particular the provisions of Part VII. relating to the enforcement of charges shall extend and apply to mortgages of land which have been executed before the coming into operation of this Regulation so that the powers in such mortgages mentioned shall only be exercisable in accordance with the provisions of Part VII., or as near thereto as circumstances admit."

In Part VII., dealing with purchases, s. 41 is as follows " Whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Schedule E, which must be registered as hereinbefore provided."

Now the agreement under discussion was not in the form of Sched. E, and therefore could not be and was not registered. It is therefore clear that it conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant. But when that is said s. 4 has no further application. It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge, or otherwise deal with the land itself. In other words, it is contracts or conveyances which, but for the section, might be held to create real rights in a party to the contract or conveyance which alone are struck at. This view was taken by the learned trial judge, who says: " The dealing with the land in question is effected by two instruments. The first is the registered transfer as to which no exception can be taken. The second is the unregistered agreement exhibit E. But what is that document? It is an agreement on the part of the defendant to transfer to plaintiff the land upon a certain contingency happening—in other words, an executory agreement. It is in fact an agreement to do something in the way sanctioned by the law. It is not an attempt to transfer, but a conditional promise to transfer. Mr. Rogers contended that these Courts have never held that such an instrument came within the scope of s. 4 of the Regulation, and I am in complete agreement with him on that point." This is substantially concurred in by the majority of the Court of Appeal, though their opinions are expressed in somewhat different words. Their Lordships think that this view is sound.

The agreement is valueless as a transfer or burdening instrument, but it is good as a contract.

This, however, directly raises the plea based on the Limitation Enactment, and on this point, unfortunately, there seems to have been but little consideration in the Courts below. The Limitation Enactment, 1896, is framed upon the model of and in many instances textually reproduces the Indian Limitation Act (XV. of 1877). The operative part, s. 4, is as follows: "Subject to the provisions contained in sections 5 to 25 (inclusive), every suit instituted after the period of limitation prescribed therefor by the Second Schedule hereto shall be dismissed, provided that limitation has been set up as a defence."

The provisions of ss. 5 to 25 have no reference to any matter here relevant. The whole point arises under the Second Schedule. Now the schedule provides different periods of limitation and consists of 116 articles. The periods of limitation vary from one year, the shortest, to sixty years, the longest. Apart from one provision as to pawns, or deposits, for which the period is thirty years, the next longest period to the sixty years is twelve years. The present suit was begun more than twelve years after the transaction in question. It is therefore barred under all categories, except those as to which the period of sixty years is applicable. Accordingly it is to art. 115 of the schedule that the learned judges refer this. That runs as follows: "115. Against a mortgagee to redeem or to recover possession of immovable property mortgaged."

The question, therefore, is, who is a mortgagee and what is property mortgaged in the sense of the schedule? The learned judge, after the passage already quoted as to the effect of s. 4, proceeds as follows: "My decision, then, upon the second issue" (the second issue being, "Is the agreement of March 1, 1895, valid as a mortgage or otherwise?") "is that the agreement of March 1, 1895, is a valid agreement and, taken with the transfer, shows this transaction to have been for the purpose of securing a debt. It is in this sense that I have in this judgment used the term 'mortgage.' I have done so for convenience sake, though in this country, fortunately for its inhabitants, the mortgage of immovable property, as understood in England,—a transaction which, as Lord Macnaghten said

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J. C. in *Samuel v. Jarrah Timber and Wood Paving Corporation* (1), no  
 1917 one ever understood by the light of nature—does not exist. The  
 HAJI ABDUL answer to the third issue” (the third issue being, “Is plaintiff’s  
 RAHMAN claim for a transfer of the land by defendant barred by the Limita-  
 v. tion Enactment, 1896?”) “is ‘No,’ as the period of limitation is  
 MAHOMED sixty years.”  
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In other words, having specially said that this agreement is not a mortgage in the proper sense of the word, he proceeds to assume rather than to argue that “mortgage” in the schedule must include any arrangement whereby land is held in security for debt. The learned Chief Judicial Commissioner says with equal brevity: “Upon this it seems to me sufficient to say that, the right of redemption being established and the suit being brought within the period allowed by art. 115 of the Limitation Enactment, the plaintiff cannot be debarred of relief on the ground of delay.” And Edmonds J. says: “Another ground of appeal is that the agreement was an executory agreement, and that any action upon the contract should be brought within the period of limitation provided for. Though the learned judge did analyse the transaction, it is quite clear to my mind that his decision was given on the ground that the transaction had to be regarded as a whole. Whether an equity of redemption should more properly be regarded as a contract or a trust, the period of limitation within which a mortgagor can enforce it is declared by the Limitation Enactment to be sixty years.”

It seems to their Lordships that the learned judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment. The very phrase “equity of redemption” is quite inapplicable in the circumstances. There is no provision in the Regulation for mortgages apart from what is described as a “charge”; indeed, they are, except as regards those of the past, de facto abolished after the date of the enactment by s. 4 already quoted. That provides for charges, which must be made in a statutory form and must appear on the register to be effective. Under such a system the right to the land remains with the registered owner. He has nothing to redeem,

(1) [1904] A. C. 323.

his right on paying the debt being to have the charge cleared off the register. It is true that, in spite of this, the schedule uses the words "mortgagee" and "mortgage," and they must be given effect to. In the opinion of their Lordships, this effect must not be given by loosely construing the word "mortgage" as meaning any transaction which results in land being transferred in security of debt as opposed to sale or other contract or right which eventuates in out-and-out conveyance. On the contrary, in their view, the relationship of mortgagor and mortgagee, when referred to in the schedule, is, in connection with transactions since the date of the Registration Regulation, confined to such relationship as is recognized by the Registration Regulation, and can therefore only be constituted by and under a proper registered charge. It follows that the right to sue under the agreement, which in this case was the only right in the plaintiff, is not preserved under art. 115 of the schedule of the Limitation Enactment, and is consequently barred by the general provisions of the Act.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgments of the Courts below reversed, and the suit dismissed with costs, both here and in the Courts below.

Solicitors for appellants : *Haslam & Sanders.*

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—

YORKSHIRE INSURANCE COMPANY,  
LIMITED . . . . .  
  
CAMPBELL . . . . .

AND  
  
RESPONDENT.

} APPELLANTS ;

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

*Insurance (Marine)—Warranty—Words qualifying Subject-matter—  
Intention to warrant—Commonwealth Marine Insurance Act (No. 11  
of 1909), ss. 39, 41.*

In a policy of marine insurance, prima facie all the words which the policy contains (except parts of the general form inapplicable to the particular transaction) are words of contract. Words qualifying the subject-matter of the insurance prima facie are words of warranty constituting, under s. 39 of the Commonwealth Marine Insurance Act, 1909 (a section in the same terms as s. 33 of the English Act of 1906), a condition which must be complied with, whether it is material to the risk or not. In considering whether words in a policy were intended by the parties to be a warranty regard must be had to the nature of the transaction, and the known course of business and forms in which similar transactions are carried out, but not to the particular facts found to have occurred at the inception of the transaction or during the negotiations.

In a proposal for the insurance of a horse against marine risks and mortality during a voyage the horse was wrongly stated to be by Soult out of St. Paul mare. The policy incorporated the proposal and made it the basis of the contract. The assured sued to recover a total loss :—

*Held*, that the words above mentioned constituted a warranty within s. 39 of the Commonwealth Marine Insurance Act, 1909, and that the action consequently failed.

Observations in *Union Insurance Society of Canton v. George Wills & Co.* [1916] 1 A. C. 281, 286, 288, explained.

APPEAL by special leave from a judgment of the High Court of Australia (November 5, 1914) reversing a judgment of the Supreme Court of Western Australia (December 13, 1913) and restoring the judgment of McMillan A.C.J. at the trial.

\* *Present* : LORD BUCKMASTER L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

By a policy of marine insurance dated April 21, 1911, the appellants insured to the respondent a horse for a voyage from Sydney to Fremantle against marine perils, and the risk of mortality during the voyage.

The policy provided that a proposal form, which had been signed on behalf of the respondent, should be the basis of the insurance and should be incorporated therein. The insurance was declared to be upon "one bay gelding branded U.H.Y. near shoulder, two hind legs white, blaze on face, slight chip off knee, grey hairs near side belly." The policy contained a warranty that the animal was sound and in fit condition to travel. It contained a clause that, in the event of any deviation whatsoever from the terms of the policy or change of voyage or omission or inaccuracy in description of interest, it was declared and agreed that the insured should be held covered at a premium to be thereafter agreed. The sum insured was 425*l.*, but the policy was unvalued.

In the proposal form, under columns headed "Colour, brands, or marks" and "Description of animals," was written "Bay gelding by Soult × St. Paul (mare), 5 yrs," followed by the words of description mentioned above or appearing in the policy, and there was an express warranty that the horse was well and free from disease. The proposal form further contained a declaration by the person signing it warranting and declaring the truth of "all the above statements."

During the course of the voyage the horse died from natural causes.

The respondent sued the appellants in the Supreme Court of Western Australia to recover a total loss under the policy. The appellants, among other defences, pleaded that the words "by Soult out of St. Paul mare" in the proposal constituted a warranty, and that the horse did not comply with those words.

The action was tried by McMillan A.C.J. The learned judge found that the horse was not by Soult out of St. Paul mare, but held that it was not material that the pedigree of the horse was incorrectly stated, and gave judgment for the respondents.

Upon appeal to the Full Court, consisting of Burnside and Rooth JJ., the decision was reversed and judgment entered for the appellants.

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Upon a further appeal to the High Court of Australia a majority of that Court (Gavan Duffy and Rich JJ., Barton J. dissenting) restored the judgment of the trial judge. The majority of the Court held that the words in the proposal were words designating the subject-matter insured under s. 32, sub-s. 1, of the Commonwealth Marine Insurance Act, 1909, and were not a warranty within the meaning of ss. 39 or 41 of that Act. The appeal to the High Court is reported at 19 C. L. R. 166, where the proposal form is set out in full.

1916. July 25. *E. M. Pollock, K.C.*, and *Alfred Adams*, for the appellant. Both the policy and the proposal provide that the latter is to be the basis of the insurance. That the statement is material is therefore not open to question, and its untruth being established the policy is void: *Thomson v. Weems*. (1) Further, the declaration in the proposal in terms warrants every statement made in it. No question therefore arises as to the intention of the parties.

*Sir Maurice Hill, K.C.*, and *Russell Davies*, for the respondent. Upon the true construction of the proposal form the declaration does not apply to the earlier part of it. If there is an ambiguity in the form and language the proposal must be construed against the insurers: *Thomson v. Weems*. (2) Whether any statement is intended as a warranty depends upon the intention of the parties: Commonwealth Marine Insurance Act, 1909, s. 41; *Union Insurance Society of Canton v. George Wills & Co.* (3) The pedigree of the horse was not in any way material to the risk, it was unnecessary for identification, and the policy being open and not valued, did not affect the amount recoverable. The "held covered" clause draws a distinction between a warranty avoiding the policy and an inaccuracy of description. These considerations show that the pedigree was not intended to be warranted.

*Pollock, K.C.*, replied.

[As to the "held covered" clause reference was made to *Hewitt Brothers v. Wilson*. (4)]

(1) (1884) 9 App. Cas. 671.

(2) 9 App. Cas. 671, 682.

(3) [1916] 1 A. C. 281.

(4) (1915) 20 Com. Cas. 241.

1916. Oct. 23. The judgment of their Lordships was delivered by

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LORD SUMNER. The point in this case is the construction of a policy of marine insurance on a horse shipped from Sydney, N.S.W., to Fremantle, Western Australia. Sects. 39 and 41 of the Commonwealth Marine Insurance Act, 1909, state the law. The insurance is effected in a form more common in accident than in marine insurance. The intending assured subscribes a proposal in the insurer's printed form, and when the risk has been accepted the policy issued incorporates this proposal. The policy itself is similar to those of most marine insurance companies. What the appellants have to establish, following the wording of the statute, is that there is expressed on the face of this policy, as the effect of this incorporation of the proposal, a form of words from which an intention may be inferred that the assured affirms, by way of promise, the existence of a particular state of facts, namely, that the horse was by Soult out of a St. Paul mare, and was five years old. At the trial the Acting Chief Justice of Western Australia, and in the High Court of Australia the majority of the judges (Gavan Duffy and Rich JJ.) held that no such intention could be inferred, while the judgments of the Full Court of Western Australia and of Barton J. in the High Court were to the contrary effect.

To require proposals for insurance to be made in writing and to incorporate them into the policy is a change from the ordinary course of marine insurance business, which is in favour of the insurer. Unfortunately it raises new difficulties. When the assured's statements, made in the course of negotiations, are negotiations only and are made by word of mouth, they affect the insurance itself only when they are proved by evidence, and are also shown to misrepresent facts material to the risk and material to be known by a prudent underwriter in deciding whether or not to take the risk, and, if so, at what premium. It is for a jury to find on evidence what was said and whether it was material. When the applicant for insurance has to subscribe his statements in writing, and then they are made a part, and that a promissory part, of the policy itself, the whole matter is changed. There is now no such question of fact for a jury; these are questions of construction for the Court. There stand the statements in writing; they now form the basis and are

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part of the contract of insurance. The question is what they mean and what is their legal effect. The construction of the assured's statements in their new setting is no easy matter. The "proposal," or part of it, originally was the applicant's own statement to the underwriter; now, though without any change in its language, it becomes as to some of its contents part of the underwriter's promise to the assured, and as to other of its contents part of the assured's promise to the underwriter. In construing this composite instrument the Court has to begin by redistributing the contents of the proposal according to their proper places in the form of the policy. Further difficulties arise from the fact that the proposal is in a printed form, prepared by the insurance company for general use in a host of transactions, and, though signed by the applicant, is often filled up on his behalf by some one, who for general purposes is the insurance company's agent and pays little more attention to the language he employs than does the assured himself. Thus intentions which as a matter of fact were originally obscure have to be ascertained by construing language also obscure, and, to add to the difficulty, whatever the language meant when the assured put his hand to it in the proposal, it must be construed by the Court as part of the policy, a highly technical instrument, which as likely as not the assured never saw.

The appellants use a proposal form which is printed in at least ten different founts of type. This no doubt diversifies its appearance, but for purposes of construction founts of type have no legal meaning. It deals with seven matters. It begins with a request to insure "the under-mentioned interest" upon a certain voyage. For the particulars of the interest six columns are provided, each with a printed heading. These columns are enclosed by a pair of parallel lines at top and bottom ruled across the sheet. The respondent relied upon the lower pair of these lines as showing that what was above them was a description of interest insured and only what was below them could be in the nature of a warranty. Unfortunately these lines are mere typography. They complete the framework to be filled in, and are of no significance in the construction of the document. It must be confessed that this framework was of singularly little use in the present case, for the words in question are written across five of the six columns provided, though

at most they only belong to the first two, namely, those headed "colour, brands or mark, &c.," and "description of animals," and, even so, they are not distributed between these two columns in any way, but run irregularly as follows: "Bay gelding by Soult × St. Paul (mare), 5 yrs U H Y nr. sh., 2 hind legs white, blaze on face, slight chip off knee, grey hairs nr. side belly." The reader must sort out these statements for himself. One of the columns is headed "warranty," but this is a misnomer. It is really the space in which the applicant states which of two sets of terms, printed at the foot, he means to apply for—"all risks" or "f.p.a." Below these blanks and the lower pair of parallel lines the print states a warranty, which the appellants require in all cases, and then come four questions for the applicant to answer; three ask him as to matters of fact within his knowledge, and the fourth asks at which of the appellants' branch offices he wishes a claim to be payable. After another printed term about proof of death, of minor importance, come next a declaration to be signed by the applicant and a statement of the rate and amount of premium. The declaration is as follows: "I, the undersigned, do hereby warrant and declare the truth of all the above statements, that I have not withheld any important information, and I agree that this declaration shall be the basis of the contract between me and the Yorkshire Insurance Company, Limited, subject to the conditions of the policy of the company."

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Even as a proposal this form leaves much to be desired. When it comes to be transplanted into the policy it sets puzzles alike to the clerk who fills up the policy and to the judges who interpret it. Still their Lordships cannot accept the respondent's argument that the result is an ambiguous document which ought to be read *contra proferentes*. Opinions may differ, and have differed, as to the right reading, but when one meaning or the other is chosen the rest is clear. As it happens, the person who filled up the policy described the horse in terms of the proposal form, omitting the words "by Soult × St. Paul (mare), 5 yrs," and the form of the policy differs materially from the words of the "all risks" clause, as stated in the proposal form, but these vagaries are cured, though not excused, by the words in the policy "which proposal or statement the insured hath agreed shall be the basis of this policy, and be considered as



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incorporated herein," and by the words in the "all risks" clause in the proposal form, "subject to the terms and conditions of the company's policy."

Prima facie, all the words which the policy contains (except parts of the general form inapplicable to the particular transaction) are words of contract, to which effect must be given. Prima facie, words qualifying the subject-matter of the insurance will be words of warranty, which in a policy of marine insurance operate as conditions. The words "by Soult × St. Paul (mare), 5 yrs," though not inscribed on the face of the policy, are there none the less by incorporation, and by the same incorporation the assured "warrants and declares" their truth, unless, indeed, they are outside "all the above statements" in the declaration which he signed. The respondent says (1.) that "all the above statements" means "all the above statements below the lower pair of parallel lines ruled across the form," and one reason given is that the printed words "subject to the following warranty," which occur at that point, import that what succeeds them may be words of warranty, but that what precedes them is not. Their Lordships can only say that they cannot so restrict "the above statements," which in their opinion extend at least to every statement of existing fact purporting to come from the applicant and standing on the proposal paper anywhere above the declaration.

The respondent next says (2.) that the words in question cannot be material but should be disregarded, for the policy is an open one, and therefore in case of loss only the animal's actual value, not exceeding 425*l.*, is payable, be his pedigree what it may. He says that the words in question have no more to do with the insurance than "has carried a lady," or "would suit an elderly gentleman," and are really only appropriate to a seller's advertisement, and not to a policy of marine insurance. Their Lordships appreciate the weight of this argument, which prevailed with the majority of the judges in the High Court, but they cannot accept it. The Act itself provides that, where the words used express an intention to warrant, they have effect as a condition, which must be exactly complied with, whether material to the risk or not. It is for the purpose of negating such an intention that the alleged immateriality is relied on, and it is said that words not "bearing upon the risk," to use

Lord Blackburn's phrase, cannot have been meant as a warranty but should be passed by in construing the policy. How far any words which the parties have introduced should be disregarded by a Court in construing the contract, unless they are plainly repugnant or insensible; is a matter which need not be further discussed, because, in their Lordships' view, the words in question are capable of materially affecting the transaction. They do "bear upon the risk." Regard must be had, no doubt, to the surrounding circumstances, in order that the policy may be read as the parties to it intended it to be read: *Union Insurance Society of Canton v. George Wills & Co.* (1); but this means having regard to the nature of the transaction and the known course of business and the forms in which such matters are carried out, and not to particular facts proved to have occurred at the inception of the transaction or during the negotiations, such as were detailed in the evidence at the trial. If the words in question were left out, there would be nothing to show what kind of horse the animal insured was. It might be anything from a Shetland pony to a Suffolk punch; it might be thoroughbred or cross-bred; it might be any manner of bay gelding, branded as described, which happened to have the white patches and grey hairs in question, and had been let down and chipped its off knee. It was insured against "all risks," including the risk of being slung overboard, and, whilst on board, against all sea risks, including mortality. Their Lordships cannot say that such risks may not be capable of being affected by the circumstances expressed in the words which the respondent seeks to deprive of significance. The courage, the docility, the endurance of the horse, and the consequent likelihood of its making the voyage and being landed safely, may, for all their Lordships know, be affected one way or the other by the pedigree in question; and in any case, since the parties have imported this statement into their contract presumably they thought it material. Again, the words may be material if, in case of loss, the identity of the animal came to be disputed, or if, the vessel being overdue, the underwriters desired to reinsure their line on the horse. Their Lordships are therefore of opinion that effect must be given to the words in question by holding that the assured warranted their truth, in accordance with the intention expressed in the form of words

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employed, and, as the words turn out to have been unfounded, in fact, the policy is avoided and the appeal must be allowed.

The policy further contained a "held covered" clause, and the respondent claimed the benefit of it. This point had neither been pleaded nor argued below, and it must not be assumed that, consistently with settled practice, their Lordships could have entertained it; but the appellants by their counsel undertook "to discuss the matter with the respondent, and if necessary, to have the rights decided by litigation." The proper order will therefore be that the appeal be allowed and the judgment in favour of the plaintiff be set aside, and that the respondent have liberty to amend the pleadings so as to raise the question, as a further issue in the action, whether he is entitled to be held covered, and if so on what terms, notwithstanding that the warranty of the horse's pedigree has not been fulfilled, and to proceed to trial of that issue with all despatch, and at the trial to give further evidence, if so advised, but not so as to contradict or vary the facts already found, but that, unless he amends within six months and so proceeds thereafter, final judgment in the action be entered for the appellants. In accordance with the order giving special leave to appeal, dated March 23, 1915, the appellants will pay the costs of this appeal as between solicitor and client. Their Lordships will humbly advise His Majesty to the above effect.

Solicitors for appellants : *Gray & Dodsworth.*

Solicitor for respondent : *Shirley W. Woolmer.*

## [IN THE HOUSE OF LORDS.]

WATTS, WATTS AND COMPANY, LIMITED APPELLANTS; H. L. (E.)\*

AND

MITSUI AND COMPANY, LIMITED . . . RESPONDENTS. 1917  
March 16.

*Shipping—Charterparty—Breach—Failure to Load—Restraints of Princes*  
*—Reasonable Apprehension—Measure of Damages—Penalty Clause*  
*—Limitation of Liability.*

A clause in a charterparty which provides: "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight," is a penalty clause only and cannot be read as a limitation of the right to recover proved damages (*Wall v. Rederiaktiebolaget Luggude* [1915] 3 K. B. 66 approved).

The plaintiffs sued the defendants for damages for breach of a charterparty dated in June, 1914, whereby the defendants agreed with the plaintiffs to provide a steamer (name to be declared at least twenty-one days before expected date of readiness) to proceed to Marioupol, on the Sea of Azov, and there load a cargo of sulphate of ammonia and to carry it to Japan for delivery there. The charterers had the option of cancelling the charter if the vessel was not ready to load by September 20, 1914. The exceptions clause included arrests and restraints of princes.

On September 1, 1914, the defendants declined to name a steamer on the ground that the British Government had prohibited steamers from going to the Black Sea to load, but in fact no such prohibition had been issued. The plaintiffs accepted this refusal as a repudiation of the charterparty. The Turkish Government closed the Dardanelles on September 26, 1914. The plaintiffs had purchased the sulphate of ammonia under a contract of April, 1914, and, being unable to procure a steamer to carry the goods to Japan, they failed to take delivery from their sellers and had to pay them 4500*l.* to be quit of their bargain, owing to a drop in the price of sulphate of ammonia. The defendants pleaded the exception of restraints of princes in justification of their breach of the charterparty. At the trial the Court found that if a ship had been sent to load the closing of the Dardanelles would have prevented her from passing out on her voyage to Japan, but that the plaintiffs could, and would as reasonable men, have effected an insurance against sea and war risks on the value of the cargo at the port of destination:—

*Held* (affirming the decision of the Court of Appeal)—(1.) that the exception afforded no defence to the action, inasmuch as a

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\* *Present*: LORD FINLAY L.C., EARL LOREBURN, LORD DUNEDIN, LORD PARKER OF WADDINGTON, and LORD SUMNER.



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reasonable apprehension of the impending closing of the Dardanelles, though justified by the event, did not constitute a restraint of princes; (2.) that the plaintiffs were entitled to be indemnified for being deprived by the defendants' default of the opportunity of insuring; and (reversing the decision of the Court of Appeal) (3.) that the measure of damages ought not to be determined by reference to the market price of sulphate of ammonia at the port of loading at the time of the breach, there being no evidence of the existence of any market there for that article, but was the difference between the price agreed to be paid by the plaintiffs for the goods and the market price in Japan at the expected date of arrival, after deduction of the insurance premium and expenses (*Rodocanachi v. Milburn* (1886) 18 Q. B. D. 67 distinguished).

Decision of the Court of Appeal [1916] 2 K. B. 826 varied.

APPEAL from a decision of the Court of Appeal (1) varying a decision of Bailhache J.

The following statement of facts is taken from the judgment of the Lord Chancellor :—

“ The appellants in this case are shipowners who had entered into a charterparty dated June 5, 1914, with the respondents, the charterers, by which it was provided that a steamer, the name of which was to be declared, should proceed to Marioupol, on the Sea of Azov, and having there taken on board a cargo of sulphate of ammonia should carry it to Japan for delivery there. By the 7th clause the charterers had the option of cancelling the charter if the vessel was not ready to load by September 20, 1914. By the 12th clause there was an exception for the arrests and restraints of princes. The 13th clause was as follows: ‘ Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight.’

“ The respondents had in April, 1914, purchased from the Coppee Company in Russia 3500 tons of sulphate of ammonia, and if the steamship had arrived the goods so purchased would have been shipped by it for Japan.

“ At the beginning of August war broke out between Germany and Great Britain, Russia, and France. Turkey did not enter into the war until November, 1914. On September 1 the respondents through their brokers requested that the name of the steamer should be declared. On the same day the appellants replied that the charter-

party must be considered cancelled. The reason given was that the British Government had prohibited steamers from going into the Black Sea to load, but in fact there had been no such prohibition.

"The Dardanelles were closed to navigation after sunset on September 26.

"The action was brought by the charterers for not providing a steamer according to the charterparty. The defence was that on the reasonable apprehension of Turkey becoming involved in the European war, and of the Dardanelles being thereupon closed, the shipowners were justified by reason of the exception of arrests and restraints of princes in not sending a vessel to load.

"The action was tried by Bailhache J. in the Commercial Court. He decided :

"1. That there was no justification for the breach.

"2. That even if the steamship had arrived by the cancelling date (September 20) she could not have loaded and got to the Dardanelles before they were closed.

"3. That if the steamship had been provided at Marioupol the charterers could have insured the goods for Japan and that they had lost the chance of doing so owing to the shipowners' default.

"4. That no other charterparty being procurable the charterers were entitled to 3800*l.*, being the amount of profit which they would have insured on the voyage to Japan. The learned judge arrived at this amount by taking the difference between the price at which the charterers had purchased the goods under the contract of April, 1914, and the market price in Japan in November, 1914, the date at which the goods might have been expected to arrive, but by a lapse no allowance was made for the premium which the respondents would have had to pay on the insurance.

"A claim for 4500*l.* which the charterers had paid to their sellers (the Coppee Company) to have their contract of purchase cancelled was disallowed as being too remote.

"Both sides appealed to the Court of Appeal--the shipowners on the ground that they ought to have been held not liable, and the charterers on the ground that they ought to have been allowed the sum of 4500*l.* which they had paid to their sellers. The Court of Appeal disallowed the claim for 4500*l.*, agreeing in this with Bailhache J., and, while holding the shipowners liable in damages, varied

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H. L. (E.) the order of Bailhache J. by directing a reference to ascertain the amount of the damages, and declaring that the measure of damages was the difference between the price which the goods would have realized if they had been sold in Japan at the end of November, 1914, and the cost price of the goods at the port of loading at the current price at the nearest available date to September 10, 1914, in addition to freight, insurance premiums for war risks, and brokerage.

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“ The effect of the decision of the Court of Appeal was that, while the damages would be reduced by the allowance for the amount of the premium, they might have been largely increased if it proved to be the case that the cost price at Marioupol at the time of the breach was less than the price under the contract of April, 1914.

“ The shipowners appealed to this House: there was no cross-appeal in respect of the 4500*l.* disallowed by both Courts below.”

Feb. 12, 13, 15. *Leck, K.C.*, and *Norman Raeburn*, for the appellants. 1. No breach has been committed, for the refusal of the appellants to send a ship is within the exception of restraints of princes. At the date of the refusal there was a reasonable apprehension of Turkey becoming involved in the war and of the closing of the Dardanelles, and this apprehension was justified by the event. If the event shows that the apprehension is well founded, that is to say, that the performance of the contract has become impossible, no breach is committed in declining to take the initial step: *Geipel v. Smith* (1); *The San Roman* (2); *Nobel's Explosives Co. v. Jenkins & Co.* (3); *Embiricos v. Sydney Reid & Co.* (4) Although there was no operative restraint at the time of the refusal, the circumstances were such as to lead to a reasonable apprehension that the adventure would be frustrated by an excepted cause, and in every case of frustration the after-events throw a reflected light on the transaction: *Horlock v. Beal.* (5) [They also referred to *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* (6)]

2. Assuming that a breach has been committed, the damages did not flow from the breach, but were due to the intervention of the Turkish Government in closing the Dardanelles, and the appellants

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| (1) (1872) L. R. 7 Q. B. 404, | (3) [1896] 2 Q. B. 326, 330. |
| 414.                          | (4) [1914] 3 K. B. 45.       |
| (2) (1873) L. R. 5 P. C. 301, | (5) [1916] 1 A. C. 486, 505. |
| 305.                          | (6) [1916] 2 A. C. 397.      |

are liable for nominal damages only. The ship could not have reached its destination if the contract had been fulfilled, and it cannot be assumed, in the absence of evidence, that the respondents would have insured against war risks. The rule stated by Lord Davey in *Ströms Bruks Aktie Bolag v. Hutchison* (1), upon which the Court of Appeal has proceeded, does not apply, because in that case the non-arrival of the goods was directly due to the breach, but here the breach in no way caused what happened afterwards; and for the same reason the appellants do not fall within either branch of the rule in *Hadley v. Baxendale*. (2) In any event, the measure of damages adopted by the Court of Appeal was wrong in so far as it was not based upon the actual cost of the goods to the respondents.

3. Clause 13 of the charterparty limits the amount of damages recoverable to the amount of the freight. Bailhache J. has decided in *Wall v. Rederiaktiebolaget Luggude* (3), which he followed in the present case, that this form of clause is a penalty clause. But, notwithstanding the use of the word "penalty," there is nothing penal in the clause. It relates to proved damages and then it imposes a limitation on the amount recoverable, and this is expressed in clear language. The intention was to depart altogether from the old penalty clause which it superseded. It has been objected that if this clause is of universal application it may lead to serious injustice, but it may be construed as limited to a case of total non-performance, i.e., where no part of the contract is performed at all. It means here that if either party throws up the contract the damages are not to exceed the amount of the freight. The test of penalty or liquidated damages is the intention of the parties to be collected from the language they have used, and the mere use of the term "penalty" does not determine that intention: *Dimech v. Corlett*. (4)

*Greer, K.C.*, and *R. A. Wright*, for the respondents. 1. As to breach: it is impossible to hold that a mere apprehension that an excepted cause will come into operation at some part of a voyage will entitle the shipowner to say that he is within the exception: *Atkinson v. Ritchie*. (5) In all the decided cases where the

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(1) [1905] A. C. 515, 529.

(3) [1915] 3 K. B. 66.

(2) (1854) 9 Ex. 341, 354.

(4) (1858) 12 Moo. P. C. 199, 229.

(5) (1809) 10 East, 530.



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exception has been held to apply there was a restraint of princes in existence when the contract was alleged to be broken.

2. As to the measure of damages : the general rule, as laid down by Parke B. in *Robinson v. Harman* (1), is that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." The respondents were under no obligation to put on board the specific goods covered by the contract, though it is not suggested that they did not in fact intend to do so. The question is what is the respondents' actual loss, and in determining that question the test is what was the market value of the goods at the date of the breach, i.e., at the time of loading. The respondents have been held not to be entitled *eo nomine* to the 4500*l.*, which they had to pay to their vendors to be relieved from their bargain, on the ground of remoteness, and they have not lodged a cross-appeal on that point; but that sum depended upon the fall in the market price of the goods at the time of the breach, and substantially the same result is arrived at by applying the general principle applied by the Court of Appeal. If the contract had been fulfilled the respondents would have got their profit under the insurance, which as reasonable men they would certainly have effected, and would have escaped the consequences of the fall in the market price of the goods since the date of their contract with their vendors in April. They are therefore entitled in one form or another to recover the loss resulting from the fall in price between the date of that contract and the time of loading. There is no ground, in the case of a contract for the carriage of goods by sea like the present, for departing from the general rule applicable in the case of a sale of goods, namely, that the measure of damages is to be determined by reference to the market value of the goods at the time of the breach without regard to accidental circumstances peculiar to any particular party to the contract—in this case the contract of April: *Rodocanachi v. Milburn* (2), approved by this House in *Williams Brothers v. Ed. T. Agius, Ltd.* (3) This is a rule of general application. In *Joyner v. Weeks* (4) it was applied to the case of a breach of a covenant in a lease to deliver up the demised

(1) (1848) 1 Ex. 850, 855.

(2) 18 Q. B. D. 67.

(3) [1914] A. C. 510.

(4) [1891] 2 Q. B. 31.

premises in repair, and in *Ströms Bruks Aktie Bolag v. Hutchison* (1) to the case of failure to provide a ship. The principle laid down by Lord Davey in that case governs this.

3. Clause 13 of the charterparty must be construed as a penalty clause, and is no less worthless and unenforceable than the traditional penalty clause of which it is a variant.

*Norman Raeburn* in reply. *Atkinson v. Ritchie* (2) is distinguishable, because there the apprehension was not justified by the facts. As to the measure of damages, the alteration in the market value was due to a matter extraneous to the appellants' breach of contract, namely, the closing of the Dardanelles. Moreover, there was no free market and no market price for sulphate of ammonia.

The House took time for consideration.

March 16. LORD FINLAY L.C. (after stating the facts). My Lords, in my opinion the contention of the appellants that they could justify the failure to provide a steamship on the ground of the exception for restraint of princes was not made good. There was not, in fact, any restraint of princes to prevent the passage of the steamship through the Dardanelles and to Marioupol until the closing of the Dardanelles on the evening of September 26. There was a reasonable apprehension that the Dardanelles might be closed, but such an apprehension does not constitute a restraint of princes. To bring the case within the exception there must be an actual restraint in existence, and in the present case there was nothing to prevent the steamship from passing the Dardanelles and arriving at the port of loading by the cancelling date (September 20).

It is true that her going there, so far as the actual voyage to Japan was concerned, would have been useless, as the Dardanelles were closed before she could have got out, but if the vessel had arrived at Marioupol the charterers might have insured against war risks. I confess I have some doubt whether the respondents might not have abandoned the adventure instead of having to insure at a heavy premium, but, having regard to what passed at the trial, as stated to us by counsel on both sides, I think we must deal with the case on the footing that the insurance against war risks would have been effected. The only controversy between the parties on this

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(2) 10 East, 530.

H. L. (E.) point appears to have been as to whether such an insurance was practicable. It was proved by the one witness called that the insurance could have been effected. There was no contradiction, and I think that the Courts below were right in holding that the loss of insurance may be recovered. I do not think that the opportunity of effecting an insurance can be regarded as too remote to constitute an element of damage.

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As regards the amount of the damages, the basis adopted by Bailhache J.—correcting of course the mistake as to the non-allowance of the premium—was in my opinion correct. It was strenuously argued for the respondents that, as the 4500*l.* paid by the respondents to their sellers had been disallowed as too remote, the contract of April must be disregarded for all purposes and the loss ascertained on the difference between the market price at the port of loading at the date of the breach and what would have been the market price in Japan on arrival. It would follow, on the assumption that the cost price at Marioupol had fallen by the time of the breach to a point below the price under the contract of April, that the damages recoverable would be correspondingly increased. In my opinion the respondents' contention on this point fails. It is quite clear, and indeed was not disputed, that if the steamship had arrived at Marioupol the sulphate of ammonia which the respondents had contracted to purchase under the contract of April would have been the goods shipped, and this of course involved taking delivery of these goods and paying for them to the seller. If the respondents, having so shipped the goods, had started the steamship upon a voyage to Japan, insuring against war risks, the adventure would have been frustrated by the closing of the Dardanelles, and this would have constituted a constructive total loss. The respondents would have recovered on the insurance the value of the goods as at the time of their expected arrival in Japan, but they would *ex hypothesi* have to pay the price for the goods under the contract of April, and the difference between these two amounts would have represented their profit after deduction of premium, &c. This seems to me to exclude any inquiry as to a possible lower market value at Marioupol at the time of the breach.

The case of *Rodocanachi v. Milburn* (1) has in my opinion n

(1) 18 Q. B. D. 67.

application. That was a case in which the goods had been lost on the voyage by the fault of the ship, and it was held that the damages could not be reduced by reference to a contract for sale at a price below the market price at the date when they ought to have been delivered.

The claim of the respondents to enhance the damages by reference to a supposed fall in the market at Marioupol at the time of the breach appears to me also to fail upon another ground. There was no evidence that there was any market at Marioupol for such goods, or that they could be obtained from any person other than the Coppee Company (the respondents' vendors), and there is no evidence of any fall in the cost price of such goods at the time of the breach. It is indeed probable that the price may have fallen after exit from the Black Sea had been barred by the closing of the Dardanelles on September 26. The Court of Appeal ought not, in my opinion, to have directed an inquiry as to damages on a basis for which no foundation had been laid by the evidence at the trial.

I agree with the construction put in the Courts below on clause 13—the penalty clause. If this clause had appeared for the first time I think it might have been construed as imposing a limitation on the damages to be recovered, but the penalty clause is an old one with a settled meaning, and the intention, if it existed, to make so fundamental a change in its effect as is suggested ought to have been much more clearly shown in order to bind the other party to the contract.

In my opinion the judgments of Bailhache J. in the present and in the earlier case before him on this point were right.

In my opinion the respondents are entitled to 3800*l.*, less the cost of insurance, &c.

Bailhache J. took the premium to be 6 per cent., and on this basis the amount will be 800*l.*

I think that the respondents should have costs in the Commercial Court and in the Court of Appeal, but that there should be no costs of the appeal to this House.

My Lords, I am authorized to say that my noble and learned friend Lord Parker of Waddington concurs in the opinion which I have just read.

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EARL LOREBURN. My Lords, I need not recapitulate the facts of this case. In my opinion there was no restraint of princes on September 1 when the shipowners declared their intention of not carrying out their contract. There was an available force at hand in the Dardanelles, and if the situation had been so menacing that a man of sound judgment would think it foolhardiness to proceed with the voyage I should have regarded that as in fact a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised. I agree, however, with Lord Dunedin's expression that "it would be useless to try and fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear." No form of words is likely to cover automatically all contingencies. In the present case the lists of ships that went through the Dardanelles to and fro during the material days, which were furnished to us during the argument, though not printed in the book, show that there was no restraint by princes when the voyage was abandoned. I cannot agree with the learned counsel for the appellants that we are to judge merely by the event. The decision must be made at the time by those concerned.

If this be so, the sole remaining question relates to the measure of damages. What the plaintiffs claimed was the sum they had to pay as compensation to the sellers of the cargo which they had bought in order to load it on this ship but were disabled from loading because the defendants failed to provide the ship. Now this would not be the measure of damages in the absence of any notice to the shipowner. It is unnecessary to quote authority for this familiar rule. After the case had been heard on this footing the learned judge allowed an adjournment in order to hear evidence on another footing altogether. The plaintiffs then argued that if this ship had entered the Black Sea and reached the port of loading on September 20 (the last day allowable under the contract and the earliest day on which she could have arrived) they could have loaded her with the cargo intended. They also said that they could and would have insured the cargo against war risks, and that, though she would have been captured by the Turks on her way down through the Dardanelles, they would have recovered from the

underwriters. The evidence on this new case was very meagre, and indeed unsatisfactory, but it was uncontradicted. We are therefore bound to take it that this cargo could and would have been insured against war risks at a premium of 6 per cent. They would have done so, we must assume, because a sensible man of business would so act, and they were deprived of their opportunity of so doing.

In these circumstances I think it is legitimate to recognize this as an element in damages. A man of business in such a position would naturally load the cargo and insure against war risks if he could, even if the premium swallowed up nearly all the profits of his voyage, because he would thereby be free from any liability which might fall upon him for not himself taking delivery from his sellers, or if he himself had already taken delivery he would not be left with the goods on his hands in a port to which access might soon be made impossible by war. In short I think the plaintiffs are entitled to say to the defendants "You broke your contract in not sending your ship to the port of loading. If you had sent her we could have loaded her with a cargo which we had ready. True, it would never have reached its destination by reason of the war, but we should have insured against war risks, as any practical man would do, and we could have done so at 6 per cent. premium. Pay us what we have lost by your default. It is the avowed value at port of destination, less the actual price we paid at port of loading and the expenses, and less also the premium we had to pay for insuring against war risks." That sum leaves 800*l.* as the damages.

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LORD DUNEDIN. My Lords, in terms of the contract contained in the charterparty of June 5, 1914, the appellants were bound to send a steamer to Marioupol, on the Sea of Azov, not to arrive before September 1, and the contract cancellable if it arrived after September 20, 1914, to receive a cargo of 3500 tons of sulphate of ammonia to be carried to Japan via the Suez Canal. On September 1, 1914, the appellants informed the respondents that they considered the contract as cancelled. On the 2nd the respondents in a letter to the appellants refused to accept that proposition and called on them to proceed with the contract and give the name of the steamer which they proposed to send to Marioupol. The

H. L. (E.) appellants persisted in their attitude, and no steamer was sent.  
 1917 The present action is to recover damages for this alleged breach of contract.

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The first question that arises is whether there was a breach of contract. The non-fulfilment is admitted, but the appellants say that under the circumstances that is excused under one of the exceptions in the charterparty, namely, restraint of princes. On August 1, 1914, Germany had declared war against Russia and had begun hostile action against France, and on the night of the 4th Great Britain declared war against Germany. There was, however, at this time no activity on Germany's part in the Black Sea, or in the passage from the Black Sea to the Mediterranean or in the Levant. Turkey was a neutral. Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension. This was held long ago by Lord Ellenborough in *Atkinson*. (1) The more recent cases cited by the appellants, such as *Geipel* (2) and *Nobel's Explosives* (3), do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered. In the present case, while there was natural and great apprehension on September 1, and while the decision of the British Government immediately after to exclude Black Sea voyages from the benefits of the Government insurance scheme might well deter British subjects from sending their ships to the Black Sea, yet it is clearly proved by the production of lists of ships which after that date and up to September 26 passed inwards and outwards through the Dardanelles that there was no such restraint as would have actually prevented the appellants presenting a ship at Marioupol before or by the appointed date of September 20. I agree on this matter with the conclusion arrived at by the Courts below.

(1) 10 East, 530.

(2) L. R. 7 Q. B. 404.

(3) [1896] 2 Q. B. 326.

Breach of contract being ascertained, damages are due. What happened subsequently, so far as material, was as follows: The respondents attempted, but without success, to secure another ship at Marioupol. On September 26 the Dardanelles were finally closed and have never been open since. On November 5 Great Britain declared war against Turkey. The respondents had by a contract of date April 23, 1914, secured a cargo of sulphate of ammonia from a company, the Coppee Company, Limited, registered in England but trading in Russia at Marioupol. Under the contract the sulphate was to be accepted by the buyers not later than the end of October, but the respondents asked and obtained a prolongation of the period to the end of November. In November the respondents, who had been sounding the Coppee Company as to terms for cancelling the contract, finally intimated that they did not propose to accept delivery. A lengthened correspondence ensued as to what damages were to be paid, and the matter was finally settled in July, 1915, upon the respondents paying the Coppee Company 4500*l.*, with certain costs of an inchoate arbitration.

The respondents in the case as raised set forth the breach of contract by the appellants and their own consequent inability to accept delivery of the sulphate, and claimed as damages the said sum of 4500*l.*, together with such a sum as would represent their loss of profit on the venture, said loss to be arrived at by taking the difference between what the sulphate would have fetched if sold in Japan in November and the sum they would have had to pay for it at Marioupol under the contract. They went to trial, and the respondents contented themselves with proving the charter-party, the failure of the appellants to send a ship and their own inability to procure another ship, the facts as to the contract and the payment they had made to the Coppee Company, and the facts as to the position at the Dardanelles and the Black Sea in August and September. The evidence of the appellants was directed to the sole point of showing that there was such danger as at September 1 as justified them in refusing to send a ship.

The evidence being closed and counsel having addressed the Court, the learned judge seems to have expressed an opinion that the restraint of princes was not, in his view, made out in fact, and that in law the liability of the respondents to the seller under the

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contract was as regards the appellants *res inter alios acta* and too remote to be taken as the measure of damages as against them. He also seems to have indicated that in his view, the Dardanelles having been finally shut on September 26, the voyage could not have been made at all, as the ship, even if sent by the due date, could not after loading have repassed the Dardanelles. At the same time he indicated that it might have been possible for the respondents, if the ship had been at Marioupol, to have insured the cargo for safe arrival, and in doing so to have valued the goods at arrival value in Japan. He accordingly, without amendment of the pleadings, allowed a continuation of the cause to a future day for further evidence on that point. This evidence was subsequently led, and thereafter the learned judge gave his judgment. He found first, as already stated, as to the restraint of princes ; second, as a fact, that the Dardanelles having been finally closed on September 26, the ship, even if sent, could not have made out the voyage ; and third, as a mixed question of fact and law, that the respondents, had the ship been duly sent to Marioupol, could and would as reasonable men have effected an insurance against loss, including war risks, on the arrived value of the goods in Japan. On this third finding he repeated his view as to the payment under the contract between the respondents and the Russian sellers not being the measure of damages as against the appellants ; but he found due as damages the sum of 3800*l.*, being the difference between the proved value of the cargo as it would have sold in Japan, which he assumed covered by insurance, and the sum payable for the sulphate of ammonia if the respondents had shipped the intended cargo which would have given them an insurable subject.

Both parties appealed to the Court of Appeal. The learned judges there affirmed all the findings of the trial judge in fact and law ; but on the third finding they came to a different conclusion. While affirming the view that the damages paid under the contract could not be taken as the measure between the respondents and appellants, they decided that the proper way of arriving at the damage was to take the arrived value of the goods, which, like the trial judge, they held could be covered by insurance, and then to find the loss which the respondents suffered by comparing that sum with the cost of buying a cargo at Marioupol on or about

September 10, 1914, plus freight, insurance premium for war risk, and brokerage; and they referred it to the official referee to determine this sum.

My Lords, the general rules for assessment of damages for breach of contract have been often stated, but nowhere more succinctly than by Parke B. in *Robinson v. Harman* (1): "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." The matter was further elucidated in the case of *Hadley v. Baxendale*. (2)

Now what would have been the position of the respondents if the ship had been duly sent to Marioupol? They would have been able to ship their cargo. But what then? Once it is found as a fact that the final closing of the Dardanelles on the 26th would have prevented the ship after loading from reaching the Mediterranean, it is obvious that the intended voyage could not have been performed. The appellants argued that that being so damages should be merely nominal, the true cause of the failure of the adventure being, not their breach of contract, but the facts of war. I agree with the learned judges in the Courts below that that does not conclude the matter, but that one must next inquire what would a reasonable man have done in the supposed position. As a matter of ordinary common sense he would have insured his cargo against sea and war risks, and the possibility of so doing was, I think, rightly affirmed by the trial judge upon the evidence led. The result arrived at by him after this seems to me right, subject to correction of what is an obvious inadvertence—though it must be admitted an inadvertence which makes a great difference in the pecuniary result. I refer to the omission to deduct from the sum receivable under the insurance the amount of the insurance premium. This premium has been proved—not very satisfactorily, but I think sufficiently—to be calculable at 6 per cent.

This method of assessing the damage was, as already stated, altered by the Court of Appeal.

My Lords, I am not satisfied that the view taken by the learned judges of the Court of Appeal is correct. The respondents' counsel

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sought to support it by citing the case of *Rodocanachi v. Milburn* (1), a case which, although not binding on your Lordships, was, I apprehend, rightly decided, and is indeed in consonance with the case in this House of *Ströms Bruks Aktie Bolag*. (2) In that case the plaintiffs chartered a ship to bring cotton from Alexandria to the United Kingdom. The goods were lost by the fault of the shipowner. It was held that the damages due to the plaintiffs were the value of the goods at market price in the United Kingdom at the date at which the goods ought to have arrived, and that it made no difference that the plaintiffs had sold the goods "to arrive" at a figure less than that market price. It does not appear to me that the present case is in the same position. In that case the plaintiff, owing to the breach of contract, was actually left without his goods, and he was therefore entitled to be presented with the sum which it would have cost him to get other goods of the same quality and quantity. Whether, having the goods, he sold them to some one else, at a profit or a loss, was a matter with which the shipowner had no concern, and the fact of the sale being antecedent to the possession made no difference.

In this case the respondents were not without goods; they had no ship to put them in owing to the breach of contract. But the failure of the venture was due, not to the breach of the contract, but to the war. In order to estimate the damage an ideal situation has to be created, namely, the idea that the respondents having got the ship would have insured the arrival of the goods in Japan against all risks, and the respondents are given credit for the arrived value of the cargo intended to be shipped. But then I think we must take the ideal situation as it would have existed in fact; that they would have shipped the cargo they intended to ship, that is to say, the sulphate of ammonia acquired under the contract; and that, therefore, their only real loss is the difference between the price they would actually have had to pay for the cargo and the arrived value of the cargo under deduction of the insurance premiums. Taking it the other way, and assuming there had been a fall in the market, then, inasmuch as the venture was, in truth, frustrated not by the breach of contract but by the war, you really come to throw on the back

(1) 18 Q. B. D. 67.

(2) [1905] A. C. 515.

of the shipowner the loss in value of the goods which was truly due to the war.

Besides this, there is, in my view, something else which ought to prevent judgment passing in terms of the order of the Court of Appeal. The respondents here entered Court with a claim based entirely on their own payment to the Russian seller, and they made no other case. After the case was really concluded the learned judge intimated that he could not accept their view, and, indicating the point as to insurance, he allowed an adjournment for further evidence. The respondents had then the opportunity of making out any case they could as to insurance. They did so by proving the possibility of insuring against war risks at a premium of 6 per cent. up to at least the middle of September and by proving what would have been the selling value of sulphate of ammonia in Japan in November. They proved nothing as to the state of the market at Marioupol in mid-September, nor indicated in any way that the price would have been less than the price they had agreed to pay under the contract.

It is true that there are some references to the market for sulphate of ammonia having fallen, but they are of the most vague description. They are not the subject of direct testimony, but are all, such as they are, contained in the negotiations in correspondence between the respondents and the Coppee Company as to the amount of damages to be charged against the respondents for having broken the contract of sale, correspondence which, strictly speaking, is not evidence at all in regard to statements made in it as against the appellants.

The earliest and, indeed, the only reference which is at all direct is in a letter of September 17 from the Coppee Company to the respondents, in which, with reference to a verbal communication made by the respondents that they were not ready to accept delivery of the sulphate and would like to know what would be the terms for cancellation, the Coppee Company point out that the sulphate is all lying ready to be delivered, and that if it is not taken at the stipulated time they will have to arrange either to build or to hire a store in order to prevent deterioration of the sulphate during the cold weather. They add: "In addition the market price has diminished, and we should have to take into consideration the

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probability whether the price would further diminish during the period that the sulphate is in store." That means, of course, till the spring. On November 6 they write again: "We went into the question of the fall of price in sulphate of ammonia, and so far as we were able to estimate any future loss in this respect and for the storage," &c. Actual figures are not approached till January, 1915, when the fall in price is quoted at 2*l.* 3*s.* 9*d.* per ton. But by this time the war with Turkey was well established and the Black Sea was absolutely sealed for exit to the Mediterranean. It is obvious that the price at that time reflects no light on the price in mid-September, 1914, at a time when both in fact and ex hypothesi of the present calculation the sea was still open and a voyage from Marioupol to Japan was insurable. This exhausts the references to be found in their correspondence. There is one piece of direct testimony given by the respondents' own manager which, so far as it goes, tends the other way. He says that in July, 1915, it was rumoured that the price of sulphate in Russia was very high. He also says that there is no market price for sulphate of ammonia in Russia except the prices advertised by the Coppee Company. There is not a shred of evidence that the Coppee Company would have supplied sulphate in mid-September at a reduced price. This being so, it seems to me that there is no justification for allowing a new and fresh inquiry to make a new case. I am aware that the Commercial Court is not bound by the stricter rules of pleading which obtain in the ordinary Courts. But I cannot think it would be right at this time to start a new case as has been done by the Court of Appeal in the order complained of. The respondents have already had two cases adjudicated. It is not right, in my opinion, that they should now be allowed to embark on a third without having proved the fact which forms the foundation of it, basing the hope on the strength of casual references in a correspondence with other parties that something may turn up which will allow of a larger computation of the damages due.

I am therefore of opinion that the appeal should be allowed and that the respondent should be found entitled to the sum of 800*l.*, being the sum allowed by Bailhache J. minus the premium calculated at 6 per cent. This view makes the discussion as to the limitation of liability under the penalty clause of no practical

importance. But I wish to say that had it been necessary to decide the point I should have only wished to express my approval of the admirable judgment of Bailhache J. in the case of *Wall*. (1) I concur with the proposal of the Lord Chancellor.

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LORD SUMNER. My Lords, restraint of princes is, I think, no excuse for the appellants' breach of charterparty in not sending a steamer to load at Marioupol. No such restraint even existed, still less operated to restrain them, when they intimated their intention of not sending any steamer, or at any time thereafter till the Dardanelles were closed on September 26, 1914. They do not so contend, nor that the ambiguous and arbitrary conduct of the Porte before that date amounted to restraint.

The words "restraint of princes" do not, in my opinion, extend to the apprehension of restraint. Such is neither the meaning of the words nor the sense of the clause. No decided case has gone so far, and the language of Lord Ellenborough in *Atkinson v. Ritchie* (2) is authority to the contrary, though, as the ship there could have loaded a full cargo before any embargo was imposed (3), the case on the facts is distinguishable. The exceptions clause contemplates matters which cause a breach or prevent performance of the charter. The reasonable apprehension of a prudent man and the inutility of doing something which cannot lead to any good result are considerations material in deciding at what distance of time or over what area an existing restraint of princes may be deemed to be operative so as to restrain, but restraints in themselves they are not. The appellants admit that apprehension alone will not suffice, and say that the shipowner must take the risk of his fears being justified by the event. This argument converts a provision stipulating the effects of the operation of certain causes into a speculation upon the chances of their coming into operation. To some of the excepted matters, for example, fire, explosions, or collisions, such a contention is obviously unfitted. In any case its application would lead to the interpolation of a period of suspense during which neither party could be certain of his rights until the course of events determined the speculation in one way or the other. As Scrutton L.J. (then

(1) [1915] 3 K. B. 66.

(2) 10 East, 530.

(3) See 10 East, 298.

H. L. (E.) Scrutton J.) well observes in *Embiricos v. Sydney Reid & Co.* (1),  
 1917 “Commercial men must not be asked to wait till the end of a long  
 WATTS, delay to find out from what in fact happens whether they are bound  
 WATTS AND by a contract or not.” Such a construction would unsettle the  
 COMPANY, foundation of the contract as a matter of business, which is that  
 LIMITED the ship shall proceed upon a named voyage unless prevented by  
 v. named causes. Here, as the facts stood, the shipowners, by  
 MITSUI AND refusing to send a ship to Marioupol, evinced such an intention not  
 COMPANY, to perform their bargain as justified the charterers in treating it as  
 LIMITED. an offer of repudiation and in accepting it as such.  
 Lord Sumner.

My Lords, I have no doubt that clause 13 is a penalty clause and immaterial in the present case. To read it otherwise is to ignore the first word “penalty.” True the use of that word is not decisive; but it is not impossible to read the residue of the clause as defining a mode of calculating a mere penal sum; and to read it as a limitation of the right to recover proved damages seems to me to produce an absurd result in business. Whatever the value of the cargo or the extent of the injury to it, the shipowner’s liability in respect of it would be limited to the estimated amount of the freight, however that estimate is to be made. If the cargo owner is uninsured, he stands to lose large sums for the ship’s default. If he is insured, he upsets the ordinary course of insurance business by depriving his underwriter of a valuable right of recourse, and must suffer for this in one way or another. Nothing could be less like a “genuine covenanted pre-estimate of damage”: *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.* (2), per Lord Dunedin. The whole matter has been fully and, if I may say so, admirably discussed by Bailhache J. in the recent case of *Wall v. Rederiaktiebolaget Luggude*. (3) Your Lordships decided the point in *Ströms Bruks Aktie Bolag v. Hutchison* (4) upon a somewhat similar clause, and I think that the present case cannot really be distinguished. My only difficulty is to understand why such a provision should be inserted at all.

My Lords, I should be loth to hold that, if insurance of the war risk was feasible, proof that the charterers would have insured it was really needed. As is admitted, to insure the cargo against

(1) [1914] 3 K. B. 45, 54.

(3) [1915] 3 K. B. 66.

(2) [1915] A. C. 79, 86.

(4) [1905] A. C. 515.

marine risks would be the ordinary thing to do, and it would have been obviously imprudent in a merchant to stand his own insurer of the war risk of such an adventure. I should have thought it would be within the legitimate inferences of fact to be drawn from the known circumstances of this case to find that a war risk policy would be effected, but, as it is, the point need not be decided. What passed between the solicitors to the parties before the adjourned hearing in effect dispensed the plaintiffs from calling any witness on the point, almost formal as that witness would have been. The evidence called was very brief, but it sufficiently supports a finding that the whole line would have been covered. If so, no further inquiry on the point is needed. In effect, the breach of charterparty caused the plaintiffs to lose the chance of shipping and despatching an insured cargo and of recovering on the policy, when the cargo was lost, as it would have been actually or constructively, in consequence of the outbreak of war with Turkey. The legal presumption must be that the amount to be insured would be such as would indemnify the plaintiffs for their actual loss and pecuniary damage. This will accordingly eliminate the factor of war and bring the case within the ordinary rules as to damages for breach of contracts of carriage by sea.

My Lords, on this measure of damages a point of considerable nicety was discussed, but in my opinion it is not really raised by the evidence. The principle of measuring damages for breach of a contract for the sale of merchandise by a ruling market price at a given date is not always equally applicable to contracts of charterparty. Nor do I think that the canon expressed by Lord Davey in *Ströms Bruks Aktie Bolag v. Hutchison* (1) is in point in the present case. There the charterers were themselves producers of the intended cargo, and could have loaded the ship from their own factory if she had arrived to load. Their claim arose because the shipowner's breach of contract prevented them from delivering the cargo at the port of discharge, as they had contracted to do. Naturally, in measuring their loss, the cost of replacing it there was a factor to be compared with the value of an equivalent quantity never shipped at all. In the present case there is no evidence that there was any market or even any market price for sulphate

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(1) [1905] A. C. 529.



H. L. (E.) of ammonia at Marioupol about September 10, 1914. There is no evidence that the charterers could have bought a cargo of it there or then so as to load it on the arrival of the defendants' ship. Such evidence as there is shows that, if there was any sulphate of ammonia except the cargo in question, it all belonged to the firm from whom the charterers had contracted to buy it. If so, the charterers would have held to their bargain if the price had risen and the vendors if it had not. A good deal can be said for the argument that, if this bargain is to be disregarded as too remote (which is admitted) so far as the plaintiffs claimed to recover the damages paid for its non-fulfilment, then, too, it should be disregarded for all purposes connected with the present case, and that the position is truly an inversion of that in *Rodocanachi v. Milburn* (1): "The value is to be taken independently of any circumstances peculiar to the plaintiff." This argument, however, is based on a supposition of fact as to the existence of a market price at Marioupol, which on the evidence fails.

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My Lords, I think that in the main the appeal succeeds, and I concur in the motion proposed by my noble and learned friend on the woolsack.

*Order of the Court of Appeal set aside, and judgment of Bailhache J. varied by reducing the amount of damages awarded thereunder to 800l., and, subject to such variation, restored. The appellants to pay the costs in the Court of Appeal, except the costs (if any) incurred by the respondents in respect of their cross appeal. Each party to bear their own costs of the appeal to this House.*

*Lords' Journals, March 16, 1917.*

Solicitors for appellants: *Holman, Fenwick & Willan.*

Solicitors for respondents: *Waltons & Co.*

(1) 18 Q. B. D. 67, 76.

(1) [1916] 2 K. B. 803.

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of *S.S. Montreal* (1), which was distinguished but in no way impeached by *Webber v. Wansborough Paper Co.* (2) In the latter case the House of Lords held that the ladder to the quay was specifically appropriated to the use of the ship, and consequently the accident was of the ship and not of the shore. Here the employers had no control of the premises. The authorities show that the employer's liability begins where his control begins; the employment does not extend beyond the premises of the employer or premises of which he has the control: *Kitchenham v. Owners of S.S. Johannesburg* (3); *Holness v. Mackay & Davis*. (4) In *Gane v. Norton Hill Colliery Co.* (5), on which the Court of Appeal relied, the premises were under the control of the employers.

The following cases were also referred to:—*Cremins v. Guest, Keen & Nettlefolds* (6); *Walters v. Staveley Coal & Iron Co.* (7); *Walton v. Tredegar Iron and Coal Co.* (8); *M'Neice v. Singer Sewing Machine Co.* (9); *Millar v. Refuge Assurance Co.* (10); *Herbert v. Samuel Fox & Co.* (11)

*Shakespeare*, for respondent. The sole question is whether the accident arose in the course of the man's employment. That involves two other questions: 1. What does the employment include? 2. Was the man doing one of those things which he was employed to do? If he was, it matters not who is the owner of the premises. *Cross, Tetley & Co. v. Catterall* (12), an unreported decision of this House, which is referred to by Collins M.R. in *Sharp v. Johnson & Co.* (13), shows that a man's employment may commence before he begins work: and see *Hoskins v. Lancaster* (14) and *Nicol v. Young's Paraffin Light and Mineral Oil Co.* (15) If a man does something by virtue of his contract of service, and which but for his contract he could not do, then the accident happens in the course of his

(1) (1913) 6 B. W. C. C. 220.

(2) [1915] A. C. 51.

(3) [1911] 1 K. B. 523; [1911] A. C. 417.

(4) [1899] 2 Q. B. 319.

(5) [1909] 2 K. B. 539.

(6) [1908] 1 K. B. 469.

(7) (1911) 4 B. W. C. C. 303.

(8) (1913) 6 B. W. C. C. 592.

(9) 1911 S. C. 12; 4 B. W. C. C. 351.

(10) 1912 S. C. 37.

(11) [1916] 1 A. C. 405.

(12) March 16, 1905 (unreported).

(13) [1905] 2 K. B. 139, 145.

(14) (1910) 3 B. W. C. C. 476.

(15) 1915 S. C. 439; 8 B. W. C. C. 395.

employment. The tests to be applied in determining whether an accident arises in the course of the employment are stated by Farwell L.J. in *Gilbert v. Owners of S.S. Nizam* (1) and by Lord Loreburn in *Moore v. Manchester Liners* (2) and *Low v. General Steam Fishing Co.* (3) The deceased was on the dock premises solely by virtue of his contract of service and of the permission granted by the owners of the dock, and was at the time of his death using the dock premises for the performance of his contract.

*Hollis Walker, K.C.*, replied.

The House took time for consideration.

March 23. LORD FINLAY L.C. My Lords, this is an appeal against the decision of the Court of Appeal allowing the claim for compensation under the Workmen's Compensation Act, 1906, in respect of the death of the respondent's husband, Herbert Longhurst.

The appellants are engineers and ship repairers, and were engaged in effecting repairs to the barge *Forward*, which was lying in the South-West India Docks, and the deceased, who was a carpenter, was in their employment on this work. The docks are under the control of the Port of London Authority: they are not open to the public for traffic, but the appellants and their workmen had the permission of the Authority to pass through the docks on their way to and from the barge on which they were at work. The deceased left the barge on November 9, 1915, a few minutes before 8 P.M. In the darkness he missed his way while passing along the quay, fell into the lock and was drowned. The county court judge disallowed the claim, holding that when the deceased got off the barge on to the quay the relationship of master and servant ceased as completely as if he had got off the barge on to the high road. On appeal by the respondent to the Court of Appeal the judgment of the county court judge was reversed, and it was directed that there should be an award of 300*l.* to be apportioned among the dependants of the deceased. (4)

The employers appeal to this House and ask that the decision of the county court judge in their favour should be restored.

(1) [1910] 2 K. B. 555, 558.

(2) [1910] A. C. 498, 500.

(3) [1909] A. C. 523, 532.

(4) The amount of compensation was agreed by the parties.

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It was contended in support of the appeal that the finding of the county court judge in a case of this nature should not be interfered with. It is, however, quite plain that the finding of the county court judge was not on fact but on law. He considered that, as a matter of law, the accident did not occur in the course of the employment, on the ground that, in his view, the employment ceased when the deceased reached the quay. In my opinion this view is erroneous. It has been established by a series of decisions that employment for the purposes of the Workmen's Compensation Act may in many cases be regarded as existing before the actual operations of the workman have begun, and that it may continue to exist after the actual work has ceased ; for instance, if a workman is employed in a factory the employment normally would begin as soon as the workman has entered the premises for the purpose of his work and continue until he leaves them after the actual work is done.

There was a decision in your Lordships' House on March 16, 1905, in the case of *Cross, Tetley & Co. v. Catterall* (1), which has been repeatedly cited, but has not yet been reported. The case and appendix and the transcript of the judgments are in the library of your Lordships' House. In that case the colliery in which the man was engaged was approached by a bridge built by the employers over a canal for the convenience of their workmen, and the workman fell into the canal from the bridge while going to his work. Lord Halsbury said in giving his opinion : " I do not agree that his employment only begins at the moment he strikes the coal with his pick. I think the man was really in the employment the moment he reached the bridge. He was doing something on his master's behalf ; that is to say, he was on his way to the colliery for the purpose of working."

The decision in that case established that the employment *may* begin as soon as the workman has reached his employer's premises or the means of access thereto. And in the same way the employment *may* be considered as continuing until the workman has left his employer's premises.

The case would be different if the workman was at the time of the accident on the public highway on his way to or from his work. His employment cannot be considered as having begun if he is

(1) Unreported.

merely in transit in the public street or road to or from his employer's premises. Of course, if his employment were of a kind which is pursued on the highway he might be in the course of his employment while there, but I am speaking of cases in which he is in the public way merely in exercise of the public right of passage there on his way to or from his employer's.

The present case belongs to a class of cases where the thing on which the workman is employed is lying in a dock or other open space to which he obtains access only for the purposes of his work. Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there on his way to and from his work, and he *may* be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies. Such passage is within the contemplation of both parties to the contract as necessarily incidental to it.

The case of *Cook v. Owners of S.S. Montreal* (1) was much relied on by the appellants, but seems to me to have no application. That was the case of a sailor who had been paid off on board his ship at the end of the voyage, and from the ship got on to a "dolphin," or floating stage, connected with the quay by fixed steps and fell into the water between the "dolphin" and the quay. According to the view taken of the facts in that case, he had reached the shore before the accident took place, and on that view of the facts it was held that his employment had terminated. It may be that a different view might have been taken of the facts as regards the termination of the workman's transit from the ship to the shore, but that is immaterial. On the view taken of the facts the case has no bearing on the present one. In the subsequent case of *Webber v. Wansborough Paper Co.* (2) the Court of Appeal, apparently in deference to *Cook v. Owners of S.S. Montreal* (1), decided against the claim, but their decision was reversed in the House of Lords on the ground that the ladder from which the accident took place formed the ordinary means of access to the ship, so that the accident was held to take place in the course of the employment.

There is, however, a decision in the Court of Appeal in *Holness v.*

(1) 6 B. W. C. C. 220.

(2) (1913) 6 B. W. C. C. 583; on appeal [1915] A. C. 51.

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McKay & Davis (1), which appears to me to be in conflict with the view which I have above indicated. In that case contractors were ballasting a siding which could be reached only by going for some distance through the premises of the railway company. On a foggy morning a workman, while proceeding to his work, got on to the main line and was run over and killed. A. L. Smith L.J. and Vaughan Williams L.J. held that the accident did not arise in the course of the employment, the former pointing out that there was an entire absence of control by the employer over the premises where the accident occurred. Romer L.J. differed from his colleagues, and in the course of his judgment made the following observations (2) :

“ The deceased man was in the employment of the appellants, who had contracted with the railway company to do certain work at a spot substantially surrounded by lines of railway, and the access to which was not unattended with danger. By their contract with the railway company the appellants had to provide access for their workmen at their own cost, and accordingly they directed the men that they must cross the line to get to their work. The men were bound by the necessities of their employment and as part of its duties and dangers to cross the lines and to have, through the appellants, a special right or licence from the railway company to cross them ; that special right or licence being given by implication. When the workmen began to cross the lines, they were acting under this right or licence obtained for them by the appellants ; they were doing something which they were specially bound to do under their contract of employment, and which they could not lawfully do but for that contract. Under these circumstances I think that the employment in this case substantially began when the deceased began to act upon the implied right or licence to cross the lines. I am of opinion, therefore, that the county court judge was justified in holding that the accident occurred in the course of the deceased's employment. I think also that his finding was correct as to the circumstances under which the accident occurred. The deceased had been told to go to the Waterloo gate ; it was his nearer and more convenient way to get to his work, and it was in evidence that he was never known to use the other gate. On the facts, I should come to the conclusion that he did go by the Waterloo gate,

(1) [1899] 2 Q. B. 319.

(2) Ibid. 328.

and that he lost his way owing to the fog, and that the accident arose directly by reason of his being obliged to cross the dangerous zone of lines in order to get to his work. I think, therefore, that the deceased man was at the time of the accident acting in the course of his employment, and that the accident arose out of his employment. The cases show that the Court is not bound by a hard and fast line to consider that a workman is not acting in the course of his employment until he actually begins the work which he has to do. To my mind the present case is like that of a workman whose work lies in a particular part of a large factory, and who in order to get to it has to go through the rest of the factory and meets with an accident while so going. It is said that there is a distinction because all the parts of the factory are under the control of the same employer; but I consider that case analogous to the present; for the railway company had given the contractor the right to bring his men to their work across the lines, and the contractor had in a sense a right of control over the lines by virtue of which alone the men used the lines. In principle, therefore, I think that this case cannot be distinguished from that of the factory. This case is not like that of an injury received on the public highway by a man while going to work, when of course the employer, having nothing directly to do with the highway or its user by the men, would not be liable. Looking at the facts, I think that the very able judgment of the county court judge was correct, and that this appeal ought to be dismissed."

If the judgment of the majority of the Court of Appeal in that case were right, it would seem to me to follow that the appeal in the present case should succeed. In my opinion, however, the judgment of the majority was erroneous, and Romer L.J. in the passage which I have quoted correctly states the principles of law upon the subject. The principles, as stated by him, are, in my judgment, as applicable to the present case as they were to that with which he was dealing, and in my opinion this appeal should be dismissed with costs.

LORD LOREBURN. My Lords, I agree, and will only add that in every case the question for the arbitrator is whether the facts come within the words of the Act and that most of the decisions

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H. L. (E.) are instances of the application of those words. They do not qualify the Act itself, and there is always a danger of arguing from analogy from the facts of one case to the facts of another, or of treating the opinions of judges which are true in regard to the case before them as though they were placing a gloss on the statute. Judicial opinions on such a matter illuminate the statute but do not displace it.

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LORD DUNEDIN. My Lords, I think the judgment of the Court of Appeal was right.

The question is, Did the accident occur to the deceased man in the course of his employment? It is obvious that the word "employment" does not postulate that the workman must be actually working. No general rule can be laid down as to when employment begins and ceases, for the simple reason that each case arises in accordance with its own circumstances. Sometimes it will be easy to decide either for or against the workman. No one, for instance, would doubt if a collier was injured in the cage on his way to the face at which he was to work that the injury arose in the course of his employment, though the face might be a mile away from the pit bottom; nor would any one doubt that if the same man were starting from his house in the village and was injured while in the street before he approached the precincts of the colliery the opposite result would be arrived at. There are, however, many cases which are, so to speak, near the line, and the decisions in such cases can only be used as more or less illuminating examples of the application of the phrase "course of the employment" to divers circumstances—they can never be held as laying down absolute rules. I have thought it necessary to say this because of the stress that was laid in the argument upon the question of "control" of the premises where the accident occurred. "Control" was sought to be raised to the position of affording an absolute test whether employment had begun or ceased. I venture to go so far as to say that control of the place where an accident happens, so far from being conclusive, is neither here nor there except in so far as it may represent a fact tending to show that the accident arose in the course of the employment. The cases of *Gilmour v. Dorman, Long & Co.* (1) in England and *Hendry v. United Collieries* (2) in Scotland are

(1) (1911) 4 B. W. C. C. 279. (2) 1910 S. C. 709; 3 B. W. C. C. 567.

both illustrations of positions where there was control on the part of the employer of the locus of the accident and yet no liability. These cases were, in my opinion, rightly decided. I am therefore bound to say as I do, with great deference to a most learned judge who has specially illumined this branch of the law, that I think that proposition (b) in the judgment of the Master of the Rolls is too absolutely put. It is not a universal rule, though the authorities he refers to are cases where the control of the premises afforded, with the other circumstances of the case, the necessary evidence.

As regards the facts of this case, I cannot do better than borrow the words of Pickford L.J. : " The workman in this case in order to get to the actual place of work had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment."

I ought perhaps to mention the case of *Cook* (1), as great reliance was placed on it by the appellants. To my mind it presents no difficulty. It was explained by Lord Haldane in *Webber*. (2) In a word, the seaman had been paid and his service was entirely finished when he got away from the ship and got to land ; and the " dolphin " was held equivalent to land.

My only difficulty in the case has arisen from the fact that we are arriving at a different result from that arrived at by the learned arbitrator, and had he arrived at it by determining a pure question of fact I do not think his judgment could have been disturbed. But on reading his judgment I feel that he misdirected himself in law, for I read his judgment as turning on the point that employment must cease when actual work has ceased and the workman has passed on to premises which do not belong to his employer.

LORD ATKINSON. My Lords, I concur. I think this is a perfectly plain and simple case. The only question for discussion is whether the workman was in the course of his employment when he fell into the dock. To answer that question one must find out from his contract of employment what he was employed to do : what rights

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(1) [1913] W. C. & Ins. Rep. 206 ; 6 B. W. C. C. 220.

(2) [1915] A. C. 51.

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this contract conferred upon him, what obligations it imposed. It unquestionably conferred upon him the right, if permitted by the dock company, to traverse the premises of that company from the dock gate to the place where the barge he was working on lay. It imposed upon him an obligation to do so. He had no right or obligation to do this save under and by virtue of his contract of employment. In my view he was as much employed by his employer to get to the barge as he was to work upon it. Each of these remarks applies equally to the return journey from the barge to the dock gates when he knocked off work upon the barge. In argument some distinction was attempted to be drawn between the case where the workman has to traverse the private property of his employer to get to his work, and that where to do so he has to traverse the private property of another with the consent of that other. I do not think that is a sound distinction. When a man walks along the public streets to get to his work he is doing something which he has a perfect right to do irrespective altogether of his employment. The right does not spring from his employment at all. It belongs to him as a member of the public. I am clearly of opinion that this unfortunate accident happened to the workman in the course of his employ, and I do not think any of the authorities cited is inconsistent with this conclusion. I am therefore of opinion that the decision appealed from was right and should be affirmed, and this appeal be dismissed with costs.

LORD BUCKMASTER. (1) My Lords, in this case there is no dispute as to the facts ; indeed, there was no conflict of testimony before the county court judge calling for decision. Had it been otherwise, his determination of the result of rival evidence would, in the absence of extreme and unusual circumstances, be accepted as final. In my opinion, however, the learned county court judge has fallen into error in his endeavour to obtain from decided cases a fixed standard of measurement by which to test the meaning of the words in the statute "in the course of" and "arising out of" employment. Some of the reported cases, which have been fully referred to by the Lord Chancellor, appear to me to have made the same mistake and to have

(1) Read by Earl Loreburn.

attempted to define a fixed boundary dividing the cases that are within the statute from those that are without. This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase.

In the present instance the respondent was employed by the appellants to do work upon a barge which they had contracted to repair. The barge was situated on certain premises, namely, the South-West India Dock, under the exclusive control of the Port of London Authority. Access to and egress from these premises could only be obtained by the dock gates. In the circumstances of this case it was only as a workman employed to work upon the barge that the deceased was entitled to enter or remain upon the premises.

The accident that cost him his life occurred on his leaving the barge and while he was lawfully on the dock premises on his way out.

These circumstances are, in my opinion, sufficient to show that it was in the course of his employment that he met with his death. That the accident arose out of the employment has not been disputed.

I think, therefore, that the Court of Appeal was right and that this appeal should be dismissed.

*Order of the Court of Appeal affirmed and appeal dismissed with costs.*

*Lords' Journals, March 23, 1917.*

Solicitors for appellants : *Carpenters.*

Solicitors for respondent : *Pattinson & Brewer.*

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## [IN THE HOUSE OF LORDS.]

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May 1.THE KING (AT THE PROSECUTION OF ARTHUR  
ZADIG) . . . . . APPELLANT;

AND

HALLIDAY . . . . . RESPONDENT.

*Defence of the Realm—Order in Council authorizing Internment of British Subject—Validity—Habeas Corpus—Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1, sub-s. 1—Defence of the Realm (Consolidation) Regulations, 1914, reg. 14B.*

Reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, which empowers the Secretary of State to order the internment of any person "of hostile origin or associations," where on the recommendation of a competent naval or military authority it appears to him expedient for securing the public safety or the defence of the realm, is authorized by the Defence of the Realm Consolidation Act, 1914, s. 1, sub-s. 1, which confers upon the King in Council power during the continuance of the war "to issue regulations for securing the public safety and the defence of the realm"; therefore an order made in accordance with reg. 14B for the internment of a naturalized British subject of German birth is valid.

So held by Lord Finlay L.C., Lord Dunedin, Lord Atkinson, and Lord Wrenbury; Lord Shaw of Dunfermline dissenting.

Decision of the Court of Appeal [1916] 1 K. B. 738 affirmed.

THE appellant, Arthur Zadig, who was born in Germany of German parents on July 10, 1871, became a naturalized British subject on May 18, 1905. On October 30, 1915, he was interned in Islington under an order of the Home Secretary, Sir John Simon, dated October 15, 1915. This order was made under reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, which purported to be made under s. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8). The appellant contended that reg. 14B was not authorized by the Act and was ultra vires. Sect. 1, sub-s. 1, of the Act, reg. 14B, and the order of the Home Secretary are fully set out in the judgment of the Lord Chancellor.

On January 11, 1916, the appellant obtained from the King's Bench Division a rule nisi calling on the respondent, the governor

\* *Present*: LORD FINLAY L.C., LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD WRENBURY.

of the internment camp, to show cause why a writ of habeas corpus should not issue. On cause being shown the Divisional Court (Lord Reading C.J., A. T. Lawrence J., Rowlatt J., Atkin J., and Low J.) discharged the rule nisi, and the order of the Divisional Court was affirmed by the Court of Appeal (Swinfen Eady L.J., Pickford L.J., and Bankes L.J.). (1)

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Feb. 27; March 1. *Llewelyn Williams, K.C.*, and *F. W. Hirst*, for the appellant. Reg. 14B, which purports to have been made under s. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914, is ultra vires of the statute, and therefore the order of the Home Secretary, which was made under that regulation, is invalid. If the contention of the Crown be correct, the Executive has under this statute an unlimited power of making regulations for the safety of the realm, subject only to the qualification contained in the words "during the continuance of the present war," and a regulation might be made enabling the Government to take a man and shoot him out of hand without trial. The appellant's argument may be summed up in the following propositions:—1. Some limitation must be placed on the general words of the statute 2. A limitation is suggested by the terms of the Act itself, because, after giving power to make regulations, the Act proceeds to provide machinery for the trial of persons accused of a breach of those regulations, and it contains no express provision for imprisonment without trial. 3. The second proposition is confirmed by the language of s. 1, sub-s. 1, of the Defence of the Realm (Amendment) Act, 1915, which provides that every British subject shall be entitled to a trial by jury for a breach of the regulations. 4. General words in a statute cannot take away the vested rights of the subject or alter the fundamental laws of the kingdom. 5. This is a penal statute and ought to be construed strictly; an Act which infringes the liberty of the subject should be construed as far as possible in favour of the subject and against the Crown. 6. Where one of two possible constructions is repugnant to the traditions and Constitution of this country, that construction ought to be rejected in favour of the more reasonable construction. It is not suggested that it might not be necessary for securing the safety of the realm to confer on

H. L. (E.) the Government power to imprison a British subject without trial, but if the power of imprisonment is to be conferred at all it ought to be conferred by express words. Having regard to the great care which has always been taken in times of emergency to preserve the efficacy of the writ of habeas corpus, nothing should be taken away from the liberty of the subject except by express enactment. The operation of the Habeas Corpus Acts has been suspended on several occasions, but no general power has ever been given to the Executive to imprison on suspicion. The first occasion on which such an emergency arose was in 1696, when an Act was passed (7 & 8 Will. 3, c. 11) intituled "an Act for empowering His Majesty to apprehend and detain such persons as he shall find cause to suspect are conspiring against His Royal Person or Government." That Act did not in terms suspend the Habeas Corpus Acts, but, after reciting that there had been "a most horrid, barbarous, and detestable conspiracy formed and carried on by Papists and other wicked and traitorous persons for assassinating His Majesty's Royal Person in order to the encouraging an intended invasion from France to the utter ruin and subversion of the Protestant Religion," it gave definite powers to six members of the Privy Council to imprison persons suspected of high treason or treasonable practices without trial or mainprize. But a time limit was placed upon those powers, after the expiry of which the right of the subject to the benefits of the Habeas Corpus Acts was expressly revived. That Act has served as a model for all other suspensory Acts. On nine or ten occasions when the Executive required to be armed with extraordinary powers they came to Parliament and asked that those powers should be conferred by express enactment, but on every occasion they were carefully guarded and limited. Magna Carta and the Habeas Corpus Acts stand upon a peculiar footing and cannot be repealed by a side-wind. [They cited *Cox v. Hakes* (1); *Arthur v. Bokenham* (2); *Hawkins v. Gathercole* (3); *Reg. v. Wimbledon Local Board* (4); *Reg. v. Harrald* (5); *Nairn v. University of St. Andrews* (6); *Bebb v. Law Society* (7); *In re Boaler* (8); the

(1) (1890) 15 App. Cas. 506, 517.

(2) (1706) 11 Mod. 148, 150.

(3) (1855) 6 D. M. &amp; G. 1, 18, 21.

(4) (1882) 8 Q. B. D. 459.

(5) (1872) L. R. 7 Q. B. 361.

(6) [1909] A. C. 147, 161.

(7) [1914] 1 Ch. 286.

(8) [1915] 1 K. B. 21.

*Case of James Somersett* (1); *Hopkins v. Swansea Corporation* (2); *Entick v. Carrington* (3); Maxwell on the Interpretation of Statutes, 5th ed., p. 461; Johnson's Memoirs of Selden, p. 139; Blackstone's Commentaries, i. 127-8; iii. 129-133; Broom's Constitutional Law, 2nd ed., p. 983.]

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*Sir Frederick Smith, A.-G.*, and *Sir Gordon Hewart, S.-G.* (with them *G. A. H. Branson*), for the respondent. There is no ground for the contention that the legislation in question, has taken away the appellant's right to apply for a writ of habeas corpus if there is any foundation for it, and the wide constitutional questions which have been discussed are not really relevant to the issue. The sole question is whether reg. 14B is ultra vires of the statute under which it purported to be made. In the Defence of the Realm Consolidation Act, 1914, the Legislature has followed the practice which, whether it be a good practice or not, is now frequently adopted in domestic legislation, namely, the practice of authorizing an administrative body to make regulations to carry out the objects of the Act instead of setting out all the details in the Act itself. It is conceded that in construing regulations of the kind now under consideration the Courts ought to show the greatest solicitude in protecting the liberty of the subject; but against that must be set the fact that we are living in times when the inadequacy of the regulations for securing the safety of the realm might be fraught with graver consequences than at any previous period in the history of the nation. In an emergency such as the present, when espionage and sabotage are rampant to an extent hitherto unknown, it is essential to public safety that there should exist in the Executive a power of preventive detention. The fallacy of the appellant's case is to treat that detention as if it were punitive. It is not surprising that in this time of danger Parliament should have armed the Executive with the widest possible powers. But, in fact, for the first time, when owing to some pressing emergency exceptional legislation has become necessary, there has been no suspension of the Habeas Corpus Acts, and the inference is that Parliament has sought to obtain the same result by a simpler and, it is submitted, a more humane method. Among the objects specified in the Act for which the regulations

(1) (1772) 20 St. Tr. 1. (2) (1839) 4 M. & W. 621, 640.

(3) (1765) 19 St. Tr. 1030.



H. L. (E.) are to be made are (1.) to prevent persons from communicating with the enemy, (2.) to prevent the spread of false reports, and (3.) to prevent assistance being given to the enemy ; and how is it possible to effect these objects except by detaining persons of hostile origin and associations ? No question arises here of conferring a power of restricting the liberty of the subject by vague general words. The power to intern necessarily flows from the language of the sub-section itself.

*F. W. Hirst*, in reply, referred to the *Case of the Earl of Shaftsbury*. (1)

The House took time for consideration.

May 1. LORD FINLAY L.C. My Lords, the appellant in this case is a naturalized British subject of German birth who has been interned by an order made by the Secretary of State under the powers of reg. 14B, which was made under the Defence of the Realm Consolidation Act, 1914.

It was contended on behalf of the appellant that reg. 14B was not authorized by the Act and was ultra vires.

It is beyond all dispute that Parliament has power to authorize the making of such a regulation. The only question is whether on a true construction of the Act it has done so.

The relevant part of the Act in question (5 Geo. 5, c. 8) is s. 1, sub-s. 1 :

“ His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf ; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by Courts of summary jurisdiction, and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed—

“(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of

(1) (1677) 6 St. Tr. 1270.

any of His Majesty's forces or the forces of his Allies or to assist the enemy ; or

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“(b) to secure the safety of His Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbours ; or

“(c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces by land or sea or to prejudice His Majesty's relations with foreign Powers ; or

“(d) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty ; or

“(e) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.”

The power conferred on His Majesty is limited to the duration of the war and is to issue regulations for securing the public safety and the defence of the realm. The sub-section goes on to provide that His Majesty may by such regulations authorize the trial and punishment of persons committing offences against the regulations, and especially against regulations designed for any of the purposes enumerated under heads (a), (b), (c), (d), and (e). These heads comprise the prevention of communication with the enemy, securing the safety of His Majesty's forces and means of communication, and of railways, ports, and harbours, preventing the spread of false rumours, and the prevention of assistance to the enemy and the successful prosecution of the war being in danger.

On the face of it the statute authorizes in this sub-section provisions of two kinds—for prevention and for punishment. Any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. Any one who infringes such regulations will become the proper subject of punishment.

The regulation in question made under this statute is reg. 14B of the Defence of the Realm (Consolidation) Regulations. It is as follows :

“Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter men-

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tioned it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order :

“ Provided that any such order shall, in the case of any person who is not a subject of a State at war with His Majesty, include express provision for the due consideration by one of such advisory committees of any representations he may make against the order.

“ If any person in respect of whom any order is made under this regulation fails to comply with any of the provisions of the order he shall be guilty of an offence against these regulations, and any person interned under such order shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war, except so far as the Secretary of State may relax such restrictions.

“ The advisory committees for the purposes of this regulation shall be such advisory committees as are appointed for the purpose of advising the Secretary of State with respect to the internment and deportation of aliens, each of such committees being presided over by a person who holds or has held high judicial office.

“ In the application of this regulation to Scotland references to the Secretary for Scotland shall be substituted for references to the Secretary of State.

“ Nothing in this regulation shall be construed to restrict or prejudice the application and effect of regulation 14, or any power of internment of aliens who are subjects of any State at war with His Majesty.”

It will be observed that any action of the Secretary of State under this regulation is to be upon the recommendation of a competent naval or military authority or of an advisory committee. If on such recommendation it appears to the Secretary of State that, for securing the public safety or the defence of the realm, it is expedient so to do, he may subject any person of hostile origin

or associations to certain restrictions, one of which is internment. The order must, however, include provision in the case of any person not being an enemy subject for consideration of any representation which the person affected may make against the order by an advisory committee, which is to be presided over by a person who holds or has held high judicial office. The regulation, therefore, provides means for ascertaining whether any complaint against the justice or necessity of the order is well founded.

The order complained of was made by the Home Secretary on October 15, 1915, and is as follows :

“Whereas, on the recommendation of a competent military authority, appointed under the Defence of the Realm Regulations, it appears to me that, for securing the public safety and the defence of the realm, it is expedient that Arthur Zadig, of 56, Portsdown Road, Maida Vale, W., should, in view of his hostile origin and associations, be subjected to such obligations and restrictions as are hereinafter mentioned.

“I hereby order that the said Arthur Zadig shall be interned in the institution in Cornwallis Road, Islington, which is now used as a place of internment, and shall be subject to all the rules and conditions applicable to aliens there interned.

“If within seven days from the date on which this order is served on the said Arthur Zadig he shall submit to me any representations against the provisions of this order, such representations will be referred to the advisory committee appointed for the purpose of advising me with respect to the internment and deportation of aliens and presided over by a judge of the High Court, and will be duly considered by the committee. If I am satisfied by the report of the said committee that this order may be revoked or varied without injury to the public safety or the defence of the realm, I will revoke or vary the order by a further order in writing under my hand. Failing such revocation or variation this order shall remain in force.

“(Signed) John Simon,

“One of His Majesty’s Principal Secretaries of State.

“Whitehall, 15th October, 1915.”

The truth of the recital that Zadig is a person of hostile origin and associations was not questioned, but it was insisted that Parlia-

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ment had not conferred the power to make such an order in the interest of the public safety against such persons. The order provides for representations being made against it and for their consideration by an advisory committee presided over by a judge of the High Court, and states that, if the Home Secretary is satisfied by the report of such committee that the order may be revoked or varied without injury to the public safety and the defence of the realm, he will revoke or vary the order.

As I have stated, the power of Parliament to authorize such a proceeding was not and could not be disputed. The only question is as to the construction of the Act.

It was contended (1.) that some limitation must be put upon the general words of the statute; (2.) that there is no provision for imprisonment without trial; (3.) that the provisions made by the Defence of the Realm Act, 1915, for the trial of British subjects by a civil Court with a jury strengthened the contention of the appellant; (4.) that general words in a statute could not take away the vested rights of the subject or alter the fundamental law of the Constitution; (5.) that the statute is in its nature penal and must be strictly construed; (6.) that a construction said to be repugnant to the constitutional traditions of this country could not be adopted.

Reference was made by the appellant's counsel to the history of the various interferences with a right to habeas corpus in times of public danger, and it was urged that if it had been intended to interfere with personal liberty this is the course which would have been adopted.

I am unable to accede to any of the arguments urged on behalf of the appellant.

It was not, as I understand the argument, contended that the words of the statute are not in their natural meaning wide enough to authorize such a regulation as reg. 14B, but it was strongly contended that some limitation must be put upon these words, as an unrestricted interpretation might involve extreme consequences, such as, it was suggested, the infliction of the punishment of death without trial.

It appears to me to be a sufficient answer to this argument that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament

may do so feeling certain that such powers will be reasonably exercised.

The statute in its recital of the objects of the regulations in respect of which particularly punishment may be inflicted throws some light upon the question before the House.

The regulations are to be for preventive purposes as follows :

(a) The prevention of communication with the enemy or obtaining information for that purpose or any purpose calculated to jeopardize the operations of His Majesty's forces or those of his Allies or to assist the enemy ;

(b) To secure the safety of His Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbours ;

(c) To prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces or to prejudice His Majesty's relations with foreign Powers.

(e) Otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.

One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is to this that reg. 14B is directed. The measure is not punitive but precautionary. It was strongly urged that no such restraint should be imposed except as the result of a judicial inquiry, and indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons. It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is by the order thrown upon the Secretary of State, and an advisory committee, presided over by a judge of the High Court, is provided to bring before him any grounds for thinking that the order may properly be revoked or varied.

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The statute was passed at a time of supreme national danger, which still exists. The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges, &c., had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. This appears to me to be the meaning of the statute. Every reasonable precaution to obviate hardship which is consistent with the object of the regulation appears to have been taken.

It was urged that if the Legislature had intended to interfere with personal liberty it would have provided, as on previous occasions of national danger, for suspension of the rights of the subject as to a writ of habeas corpus. The answer is simple. The Legislature has selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted on the occasion of previous wars.

The suggested rule as to construing penal statutes and the provision as to trial of British subjects by jury made by the Defence of the Realm Act, 1915, have no relevance in dealing with an executive measure by way of preventing a public danger.

The application of the present appellant was rejected by the Divisional Court, consisting of five members, and by the Court of Appeal, and in my opinion the present appeal ought to be dismissed.

LORD DUNEDIN. My Lords, I concur in the opinion just delivered, which exactly expresses the reasons for the view I hold. It is only because I am aware that there is not unanimity among your Lordships that I add a few words.

The only question is as to the construction of the Act of Parliament. The prerogative may have been mentioned incidentally in the course of the argument, but it certainly was not founded on by the Attorney-General.

It is pointed out that the powers, if interpreted as the unanimous judgment of the Courts below interprets them, are drastic and might be abused. That is true. But the fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument obedience to which

may be compelled by some judicial body. The danger of abuse is theoretically present ; practically, as things exist, it is in my opinion absent.

Were a regulation to be framed, as my noble friend who is to follow me suggests, to intern the Catholics of south Ireland or the Jews of London the result would, I think, be the speedy repeal of the Act which authorizes the regulation.

That preventive measures in the shape of internment of persons likely to assist the enemy may be necessary under the circumstances of a war like the present is really an obvious consideration. Parliament has in my judgment, in order to secure this and kindred objects, risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body ; and has thought the restriction of the powers to the period of the duration of the war to be a sufficient safeguard.

LORD ATKINSON. (1) My Lords, I concur. Several of the topics to which the learned counsel for the appellant addressed themselves in the course of their arguments, however interesting historically, had, in my view, little if any relevancy to the question to be decided in this case, such, for instance, as the scope and nature of the legislation passed by the Parliament of England on the several occasions in her history when she was at war. The question for decision in this case is what the Legislature has done by this statute of November, 1914, not what it did by legislation passed centuries before that date. It may be that so dear to the Legislature of those days was the personal liberty of the subject that it sacrificed, or endangered, the interest of the State, and hampered the nation in its struggle for victory in order to preserve that liberty. For myself I do not at all think it was so. Or it may have been that the circumstances of the time did not need such drastic remedies as do those of the present time. However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive. What

(1) Read by Lord Dunedin.

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is contended is that the Executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact. It was also urged that this Defence of the Realm Consolidation Act of 1914, and the regulations made under it, deprived the subject of his rights under the several Habeas Corpus Acts. That is an entire misconception. The subject retains every right which those statutes confer upon him to have tested and determined in a Court of law, by means of a writ of Habeas Corpus, addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of which he is given into or kept in that custody. If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if *intra vires*, do not infringe upon the Habeas Corpus Acts in any way whatever, or take away any rights conferred by Magna Charta, for the simple reason that the Act and these Orders become part of the law of the land. If it were otherwise, then every statute and every *intra vires* rule or by-law having the force of law creating a new offence for which imprisonment could be inflicted would amount, *pro tanto*, to a repeal of the Habeas Corpus Acts or of Magna Charta quite as much as does this statute of November 27, 1914, and the regulations validly made under it. Swinfen Eady L.J. most correctly points out that the provisions of the Defence of the Realm Consolidation Act of 1914 are of two kinds—punitive and preventive. Paragraph (a) of sub-s. 1 of s. 1 contemplates and authorizes the issue of regulations designed to prevent persons communicating with the enemy, or obtaining information for any purpose calculated to jeopardize the success of the forces of His Majesty or his Allies, or to assist the enemy. Paragraph (c) likewise contemplates that the regulations should prevent the spreading of false reports. Two conditions are, however, imposed: First, the regulations can only be issued during the war, and, second, whatever they purport to do must be done for the purpose of securing the public safety and the defence of the realm. It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would

not be ultra vires and void. It is not necessary to decide this precise point on the present occasion, but I desire to hold myself free to deal with it when it arises.

Preventive justice, as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England. For instance, the 34th Edw. 3, c. 1, passed in 1360, directs the justices of the peace to "take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people." This jurisdiction is entirely different from that of binding over one person at the instance of another to keep the peace towards that other. If the person required to enter into recognizances under the statute should refuse or omit to do so he can be committed to prison. This provision of this ancient statute has received a very wide construction even in normal times : *Rex v. Justices of Cork* (1) ; *Wise v. Dunning*. (2) In the same way a dangerous lunatic may be committed to a lunatic asylum ; if while at large, he might be a danger to the community. One of the most effective ways of preventing a man from communicating with the enemy or doing things such as are mentioned in s. 1, sub-s. 1 (a) and (c), of the statute is to imprison or intern him. In that as in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defence of the realm. It must not be assumed that the powers conferred upon the Executive by this statute will be abused. By the several provisions already referred to every precaution that could be reasonably taken has, I think, been taken to prevent error or abuse.

Now in the present case the prosecutor has been interned under an order of the Secretary of State for the Home Department dated October 15, 1915. It is headed "Order under Regulation 14B of the Defence of the Realm Regulations." It sets out *the fact* which is under this section the foundation of his jurisdiction and the main

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(1) (1882) 15 Cox, C. C. 78, 84; 149.

(2) [1902] 1 K. B. 167.

H. L. (E.) cause of its exercise, namely, that the appellant is of hostile origin
 1917 and association. And in view of that fact, which is not disputed,
 REX it sets out that the Secretary of State, being duly recommended in
 v. the manner prescribed, makes an order that the appellant shall
 HALLIDAY. be interned for the purpose of securing the public safety and the
 Lord Atkinson. defence of the realm. The order thus sets out upon its face all the
 requirements necessary for its validity if the regulation under
 which it purports to be made be valid. On that assumption it shows
 upon its face jurisdiction to make it. The legal validity of this
 regulation, therefore, becomes the only question for decision in the
 case. Is it *intra vires* or *ultra vires* of the statute? Because of
 the frame and fulness of the order that question can be as regularly
 and effectively decided upon the application that the writ should
 issue as it could upon the return to the writ. For myself I must
 say that I never could appreciate the contention that statutes
 invading the liberty of the subject should be construed after one
 manner, and statutes not invading it after another, that certain
 words should in the first class have a meaning put upon them
 different from what the same words would have put upon them
 when used in the second. I think the tribunal whose duty it is to
 interpret a statute of the one class or the other should endeavour
 to find out what, according to the well-known rules and principles
 of construction, the statute means, and if the meaning be clear to
 apply it in that sense. Should the statute be ambiguous, equally
 susceptible of two meanings, one leading to an invasion of the
 liberty of the subject, and the other not, it may well be that the
 latter should be preferred on the ground of the presumed intention
 of the Legislature not to interfere with it. That is a wholly different
 matter.

This statute, to which the Royal assent was given on November 27, 1914, is framed differently from its immediate predecessor, to which the Royal assent was given on August 8, 1914, immediately after the outbreak of the war. The latter merely empowered His Majesty during the war to issue regulations "as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces, and other persons acting in his behalf, for securing the public safety and the defence of the realm." It further provided that by these regulations he might authorize the trial by court-

martial and the punishment of persons contravening any of these provisions. Sect. 1, paragraph (a), is identical with the corresponding paragraph of the later of the two statutes, save that the words "or the forces of his Allies" are introduced in the latter after the words "His Majesty's forces." Now the only way contemplated in the earlier Act of preventing persons from doing something prohibited by the regulations, or omitting to do something enjoined by them, is by trial and punishment before courts-martial. The statute is entirely *punitive* in this respect. Well, presumably, that was found to be insufficient to secure the safety of the public and the defence of the realm to the extent desired. And, accordingly, the second statute, though it covers the same ground as the first, goes much beyond the first in its scope, and differs from the first in the methods it authorizes for securing the public safety and defence of the realm, inasmuch as it provides that the regulations to be issued may not only deal with the powers and duties of the Admiralty, and so forth, and with the punishment of offenders against certain of its provisions, but it empowers His Majesty, during the war, to issue regulations for securing directly the public safety and the defence of the realm. These are wide words. They are new words. Some effect must be given to them. They obviously cover preventive methods, properly so called, for securing the desired end as well as those methods which are truly punitive. I do not think it is legitimate to treat them as of none effect, because if effect be given to them the liberty of the subject may possibly be restricted. And as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. If a person be of hostile origin or association it is, I think, impossible to say that, if free and unfettered, it would not be reasonably probable that he would communicate with the enemy, or obtain information for the purposes mentioned in paragraph (a), or spread the false or other reports mentioned in paragraph (c), or do some of the other things mentioned in other paragraphs of that sub-section. The public safety and the defence of the realm might be prejudicially affected if he did any of these things. If the Secretary of State,

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 1917 mentioned, comes to the conclusion that by reason of the hostile
 REX origin or association of some person it is expedient for securing the
 v. public safety and the defence of the realm that he should be interned
 HALLIDAY. or otherwise dealt with in the manner mentioned in reg. 14B, it
 Lord Atkinson. would, in my view, be as mischievous as absurd to require that
 the Minister, though fully warned, should remain quiescent and
 look on helplessly, waiting for the time when one of the crimes
 mentioned in s. 1, sub-s. 1, should be committed, and the perpetrator,
 if caught, and if sufficient proof were forthcoming, should be brought
 to justice and punished. The statute clearly authorizes prevention
 in the widest terms by means other than punitive. I think reg. 14B,
 enumerating and authorizing some of those means, comes within
 the scope of that authority. And, as I have already said, I think
 the precautions already referred to effectually guard against all
 injustice or abuse in the administration of the regulation. I am,
 therefore, clearly of opinion that the appeal fails, that the decision
 appealed from was right and should be affirmed, and this appeal
 be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I reckon this appeal to be in the first class of importance. My opinion differs from that of your Lordships, and this has led me to consider and reconsider the matter with care. The gravity of the issue, and the respect which I entertain for my noble and learned friends here and for the learned judges of the Courts below, with all of whom I am constrained to differ,—these appear to me to demand a statement, fuller than usual, of the grounds of my own position.

I am of opinion that the judgments appealed from are erroneous in law, and that they constitute a suspension and a breach of those fundamental constitutional rights which are protective of British liberty.

The appellant is a naturalized citizen of this country. That is to say, on the one hand, he owes submission to, and on the other he is entitled to the protection of, our laws. That is the essential pact underlying naturalization. The war made no difference to this. In fact, immediately after its outbreak the Act 4 & 5 Geo. 5, c. 17, reached the Statute-book, and s. 3 thereof confirms the pact

in terms. In the language of that section, Arthur Zadig has "to all intents and purposes the status of a natural-born British subject." His person was seized, he has been interned—now for over eighteen months—without a trial, and he has just the same title, no more and no less, to challenge such an act of force as any subject of the King. This makes the question not only serious, but perfectly general.

The appellant lost his liberty and was interned by reason of a document dated October 15, 1915, signed by the Home Secretary of the day and denominated an "Order under Regulation 14B of the Defence of the Realm Regulations." [His Lordship read the order.]

This order stands or falls with the regulation upon which it purports to be founded. The appellant falls within the ambit of its terms : he is of foreign origin. The true question affects the validity of the regulation itself. [His Lordship read reg. 14B.]

I am clearly of opinion that, although bearing to be a regulation, this is, in truth and essentially, not a regulation at all, and that it was ultra vires of His Majesty in Council to issue under the guise of a regulation an authorization for the apprehension, seizure, and internment without trial of any of the lieges. In my view Parliament never sanctioned, either in intention or by reason of the statutory words employed in the Defence of the Realm Acts, such a violent exercise of arbitrary power. It follows that the order or fiat of the Secretary of State which has already been quoted is also ultra vires.

It is to be at once observed that one provision of the regulation can have no application to the case of internment. That provision is that if the person in respect of whom any order is made fails to comply "he shall be guilty of an offence against the regulations." This is the homage paid to the Act of Parliament. But to a person seized and interned under this order of internment the language has no application. The appellant has not been guilty of any offence against the regulation ; there is nothing for which to try him as an offender against it. No charge is made against him ; he may appeal for that in vain. He has complied with the regulation, in the sense that he has been its victim. If he had violated it in any particular he would have had his right to trial ; but his case is hope-

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less in that regard ; for his person has been seized and detained for something entirely apart from any crime or offence or from anything he has said or done or attempted. The Secretary of State's fiat has gone forth. It is one of proscription.

"Where," says reg. 14B, . . . "it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person " then he may, *inter alia*, issue an order of internment.

My Lords, the Act of Parliament, as we shall see, does employ the words "for securing the public safety and the defence of the realm," but there is not one word in the Act of Parliament about "hostile origin or associations" of any person, nor indeed about internment.

These are not statutory terms. Parliament might very well have taken the subject of "hostile origin or associations" into its account ; and Parliament might very well have considered the subject of internment and dealt with it. Had it done so, Courts of law would have been bound to comply with any verdict on the subject which it embodied in statute.

Accordingly the first great and broad fact confronting your Lordships in this case is that in a matter so fundamentally affecting the rights of His Majesty's subjects Parliament has given no express sanction for the introduction of that language "hostile origin or associations." And what remains is the argument that Parliament, not expressly dealing with a matter pre-eminently demanding careful delimitation, must be held to have accomplished by implication this far-reaching subversion of our liberties.

To this argument I am respectfully unable to accede. I do not think that the Defence of the Realm Acts can be submitted to such a violent and strained construction.

My Lords, after the outbreak of war on August 4, 1914, it is plain from the Statute-book that Parliament was much engrossed in the subject of national security and defence. And I think it may be expedient to notice that the Act founded on, 5 Geo. 5, c. 8, is one of a series of four statutes passed in the period from August, 1914, to March, 1915, and to observe that useful light is obtained by looking at them together.

By 4 & 5 Geo. 5, c. 29, it was provided :

"1. His Majesty in Council has power during the continuance of

the present war to issue regulations as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces, and other persons acting in his behalf, for securing the public safety and the defence of the realm ; and may, by such regulations, authorise the trial by courts-martial and punishment of persons contravening any of the provisions of such regulations designed—

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“(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's forces or to assist the enemy ; or

“(b) to secure the safety of any means of communication, or of railways, docks or harbours ;

in like manner as if such persons were subject to military law and had on active service committed an offence under section five of the Army Act.”

By 4 & 5 Geo. 5, c. 63, it was provided :

“1. The Defence of the Realm Act, 1914, shall have effect as if—

“(a) at the end of paragraph (a) of section one thereof the following words were inserted, ‘or to prevent the spread of reports likely to cause disaffection or alarm’ ;

“(b) at the end of paragraph (b) of section one thereof there were added the following words, ‘or of any area which may be proclaimed by the Admiralty or Army Council to be an area which it is necessary to safeguard in the interests of the training or concentration of any of His Majesty's forces’ ;

“(c) at the end of section one there were inserted the following words, ‘and may by such regulations also provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making byelaws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903.’ ”

My Lords, the scheme of the statutes was that regulations were to be issued as to the powers and duties of the Admiralty, Army Council and armed services, and of other persons acting for His Majesty for securing the public safety and the defence of the realm. The assumption is that such powers and duties already exist ; but that they may be helped, made specific, or, it may be, amplified by

H. L. (E.) regulations. The caution, however, is instantly given as to preserving the rights and liberties of the subject. A trial by court-martial is prescribed and a punishment in respect of contravention of the regulation "in like manner as if such persons were subject to military law" and had offended against s. 5 of the Army Act. In short, the object was twofold—(1.) to draw up or make clear for the citizen a certain line of duty or course of conduct by the issue of a notification according to which that duty and conduct should be regulated, and (2.) to append the sanction of punishment to disobedience to such regulation.

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In no other sense, I am convinced, is "regulation" here meant. In this sense it is intelligible and apt. This is particularly clear in these two first Acts. The repositories of the power were various, extending to the humblest member of "His Majesty's forces." For them, as for the citizen at large, it was important that in the emergency of war their special duties should be named—as to what should be done or should be avoided; failure or disobedience on the part of the citizen to be ranked as an offence, and an offence to be tried in ways prescribed and punishment to follow. It is not very likely—I suggest this very humbly—that either Parliament itself or the repositories of the power—say the soldier or the sailor—would have ever dreamed that, so far at least as these Acts go, they vested these various authorities, high or humble, with power to suspend the liberties of the citizen or visit him at the official's own hand with punishment before he had been convicted as an offender. If any officer of His Majesty's service or other servant of His Majesty had acted in this overbearing and arbitrary manner the law would very quickly have overtaken such a transgression. The word "regulation" or the words "for securing the public safety and the defence of the realm" would have been an ineffective cover to him for such an act of violence.

To take the simplest case—namely, that of a soldier or sailor or other servant of the Crown—it would have been at once seen that not only private liberty but public order would be imperilled if the violent action of seizure of the person of a citizen for no offence and without either trial or opportunity of trial, though such seizure did not fall within the ordinary scope of his powers and duties under the law, was yet held to be justified by the words "for the public

safety and the defence of the realm." The law and the Government of the day would have sharply stopped such an inversion and invasion of right, and have limited the action of the delinquent officer to the procedure hitherto known to the law or prescribed by the statute itself.

It remains to be seen whether the words as to public safety and defence have any other or larger meaning in the principal Act, 5 Geo. 5, c. 8, which bears the title of "An Act to Consolidate and Amend the Defence of the Realm Acts"—those two Acts, namely, to whose provisions I have ventured to call pointed attention. Those Acts are repealed, but their provisions, shifted about, reappear in the consolidation.

Every part of s. 1 of the Act appears to me to be relevant to the problem which the House has to solve. I say this expressly, for I think that the controversy was unduly limited to sub-s. 1. That sub-section is as follows :

"1.—(1.) His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf ; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by Courts of summary jurisdiction, and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed—

- "(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's forces or the forces of his allies or to assist the enemy ; or
- "(b) to secure the safety of His Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbours ; or
- "(c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces by land or sea or to prejudice His Majesty's relations with foreign Powers ; or

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“(d) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty ;
or

“(e) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.”

The provisions of this sub-section will be presently analysed ; but sufficient has already been shown to enable the House to affirm that it is a reproduction, with additions, of the earlier short Acts, and that a further enumeration is given of the things for which regulations are designed, and the breach of which will constitute offences.

Sub-ss. 2 and 3 deal with the acquisition or user of land, factories, or workshops required for Government purposes. The provisions of s. 2 will be hereafter alluded to.

Then occur sub-ss. 4, 5, and 6. They are in these terms :

“(4.) For the purpose of the trial of a person for an offence under the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law and had on active service committed an offence under section five of the Army Act :

“Provided that where it is proved that the offence is committed with the intention of assisting the enemy a person convicted of such an offence by a court-martial shall be liable to suffer death.

“(5.) For the purpose of the trial of a person for an offence under the regulations by a Court of summary jurisdiction and the punishment thereof, the offence shall be deemed to have been committed either at the place in which the same actually was committed or in any place in which the offender may be, and the maximum penalty which may be inflicted shall be imprisonment with or without hard labour for a term of six months or a fine of one hundred pounds, or both such imprisonment and fine ; section seventeen of the Summary Jurisdiction Act, 1879, shall not apply to charges of offences against the regulations, but any person aggrieved by a conviction of a Court of summary jurisdiction may appeal in England to a Court of quarter sessions, and in Scotland under and in terms of the Summary Jurisdiction (Scotland) Acts, and in Ireland in manner provided by the Summary Jurisdiction (Ireland) Acts.

“(6.) The regulations may authorise a court-martial or Court of summary jurisdiction, in addition to any other punishment, to order

the forfeiture of any goods in respect of which an offence against the regulations has been committed.”

My Lords, it is not too much to say that so far as Parliament was concerned its intentions were directed anxiously to providing for the prompt and correct treatment according to law of the case of offenders against the regulations. Meticulous regard is paid to proceeding under the Act according to justice ; provision is carefully made for trial ; and, while promptitude is desired, it becomes clear beyond doubt that the right of the subject to trial in accordance with law shall be guarded and preserved.

One other striking feature of the legislation makes this intention on the part of Parliament luminously clear. It is the passing in a few months' time—namely, on March 16, 1915—of the Amendment Act, 5 Geo. 5, c. 34. The trial of offences is again anxiously handled, and in the same spirit—protection of the rights and liberties of the subject, and to make sure of that beyond a doubt. An offence against the regulations may, instead of being tried by court-martial, be tried by a civil Court with a jury. Sect. 1, sub-s. 2, is of particular importance. It provides :

“(2.) Where a person, being a British subject but not being a person subject to the Naval Discipline Act or to military law, is alleged to be guilty of an offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, he shall be entitled, within six clear days from the time when the general nature of the charge is communicated to him, to claim to be tried by a civil Court with a jury instead of being tried by court-martial, and where such a claim is made in manner provided by regulations under the last-mentioned Act the offence shall not be tried by court-martial :

“ Provided that this sub-section shall not apply where the offence is tried before a Court of summary jurisdiction :

“ Provided also that before the trial of any person to whom this section applies, and as soon as practicable after arrest, the general nature of the charge shall be communicated to him in writing and notice in writing shall at the same time be given, in a form provided by regulations under the said Act, of his rights under this section.”

I ask myself what language could be more significant, more scrupulously regardful of liberty, than this, that on demand of the

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 1917 after arrest he is to be informed of the nature of the charge against
 ~~~~~  
 REX him and of all his rights under the section? To all which the reply  
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 HALLIDAY. is made: "that all this scrupulous regard for liberty and the forms  
 of trial and law is of no avail to any class of His Majesty's subjects  
 against whom a 'regulation' of internment has gone forth. If a  
 British citizen be seized under such a fiat, it is not because he has  
 offended against a regulation—not at all. He has, therefore, no  
 right to be informed of any charge against him. Charge against  
 him there is none. Trial—he cannot choose its form; his rights are  
 gone without trial. A 'regulation' has gone forth against him. He  
 has been 'regulated' out of his liberty and out of every protection  
 of the kind. He must be a passive victim."

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The few words founded on here and in the Courts below in support of this super-eminent and overriding power have accordingly to be examined. Enough has been said to show that if they bear the construction contended for by the Crown they are singularly at variance with that intention to pay scrupulous regard to private right which is so plain from the scheme and language of these Defence Acts as a whole.

These are the words: "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty," &c., &c. A change has occurred in this consolidation and amendment Act,—not in the important words, but in their collocation. The important words referred to are "for securing the public safety and the defence of the realm." In the earlier Acts the regulations were to be "as to the powers and duties of the Admiralty," &c., . . . "for securing the public safety and the defence of the realm." Now the regulations issue direct from the King in Council. It is perfectly plain to me how this occurred. The later details of the section show that regulations as to the powers of officers or individuals might cover ground beyond the province of those departments or persons. For example, the Board of Trade, the Post Office, or the Foreign Office might well be concerned in, or in the carrying out of, many of these details. And so the shortest and most comprehensive method was taken, namely, of transferring the general topic dealt with in

regulations to the Government of the day--all the rest remaining in substance as before.

It is, in my view, largely owing to this simple change, however, and from the collocation in which the words now stand that the Courts below have come to their conclusion.

From that conclusion positively stupendous results follow. The words, it is said, are perfectly general; the King in Council is vested with powers to judge of what is for the public safety and the defence of the realm, and to act accordingly. All the rest of those statutsés as to trial, intimation, notification of rights; every provision for the legal disposal of the question affecting liberty—all this is on one side, the side of offence against a regulation: on the other side stands this super-eminent power of the Government of the day. In the exercise of that power the plainest teachings of history and dictates of justice demand that, on the one hand, Government power, and, on the other, individual rights—these two—shall face each other as party and party. But it is not so, so it is said; here the Government as a party shall act at its own hand; the subject as a party shall submit and shall not be heard; the Government is at once to be party, judge, and executioner. When—so is the logic of the argument—Parliament took elaborate pains to make a legal course and legal remedy plain to the subject as to all the regulations which were stated in detail, there was one thing which Parliament did not disclose, but left Courts of law to imply—namely, that Parliament, all the time and intentionally, left another deadly weapon in the hands of the Government of the day under which the remainder of those very Acts, not to speak of the entire body of the laws of these islands protective of liberty, would be avoided. As occasion served the Government of the day, despotic force could be wielded, and that whole fabric of protection be gone. My Lords, I do not believe Parliament ever intended anything of the kind. We are not in the region of subtlety or obliquity. Holding the views I do of this parliamentary transaction, and forming these from the language employed, I cannot attribute to the Legislature the intention alleged.

I proceed from the collocation, and the manner in which that collocation was achieved, to consider the words themselves. There are two views of them. The one favours complete generality: this

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H. L. (E.) has been accepted by the Courts, and to that and its importance  
 1917 I have just alluded.

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On the contrary, I humbly think it impossible to look at the statute as a whole without seeing that the whole structure must stand together, that the power in the Government to issue regulations is—within the general sphere and purpose of public safety and defence—to prescribe a line of duty and course of action for the citizens so as, in this time of emergency, to bring their private conduct into co-operation for that general end. This and this alone is what “regulation” means: it constitutes pro tanto a code of conduct; in following the code the citizen will be safe; in violating it the citizen will become an offender and may be charged and tried summarily, or by a court-martial or a jury, and as for a felony. This is perfectly simple: it squares with all the rest of the legislation and destroys none of it. It sacrifices no constitutional principle: it introduces nothing of the nature of arbitrary condemnation or punishment; the Acts become a help and guide as well as a warning to the lieges.

I have now described and dealt with the origin and collocation of the important words of the statute falling to be construed, and have stated the construction of these words, which appears to my mind to be so plain. But I am called upon both by respect and duty to inquire—and this very anxiously—into that other view of the case which has been upheld by judicial pronouncement. The case is decided not upon specialty, but upon principle, and how far-reaching that principle is will presently be seen.

It is well to gather up the things about which there can be no dispute. The power to issue regulations for the public safety and for the defence of the realm is vested by the Act in His Majesty in Council. In the course of the discussion this was incidentally alluded to in connection with the Royal prerogative. My Lords, it has nothing to do with the Royal prerogative. If once again, and ever so slightly, that prerogative gets into association with executive acts done apart from clear parliamentary authority, it will be an evil day: that way lies revolution. Do not let the thing which has been done—in my opinion a violent thing—be associated for one moment with, or at any point be said to be supported by, Royal prerogative. Its validity depends upon the Act of Parliament alone.

The form, in modern times, of using the Privy Council as the executive channel for statutory power is measured, and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself, seeing that under the Constitution His Majesty acts only through his Ministers, is simply the Government of the day. The author of the power is Parliament: the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny. That way also would lie public unrest and public peril. On all this there is no disputing.

This reduces to comparative unimportance those apparent safeguards derived not from the Act of Parliament, but inserted into the "regulations" themselves. The language of the regulation, for instance, "where it appears to the Secretary of State" and "on the recommendation of a competent naval or military authority" is simply equivalent to a declaration that the delegate, to judge and issue, is one department of Government, and that that will, of course, act in accord with, and on the recommendation of, those other departments which are presumably versed in the situation. The Government remains master. And a proviso is made for due consideration by an advisory committee of any representations against the order; but it was frankly admitted that the Secretary of State is not bound to comply with the advice received; he may do as he likes: again the Government is master.

As these considerations are revolved the importance of the issue for liberty does not wane. The interpretation put upon this Government power to issue regulations for safety and defence is that of perfect generality. Is this generality limited? it was asked. Yes, replied the Crown; the limitations are two, and two only. In the first place, regulations can only be issued during the war—a limitation in time. In the second place, they can only be issued for the

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H. L. (E.) public safety and for the defence of the realm—a limitation of purpose. But who is to judge of that purpose? As to what acts of State are promotive or regardful of that purpose, can a Court of law arrest the hand of a responsible Executive? Extreme cases may be figured in which personal caprice and not public considerations might be imagined, but in everything, from the lighting of a room to the devastation of a province, no Court of law could dare to set up its judgment on the merits of an issue—a public and political issue—of safety or defence. So that this limitation, as a legal limitation, is illusory. The only one that remains is that of time. “During the war” the Government has been allowed at its own hand to do anything it likes. “Regulation” covers all: the issue of decrees, arrests, proscription, imprisonment, internment, exile,—all are covered comprehensively by the word “regulations.” Such an issue is made on grounds which are not in the region of law; judges are not fitted to interpose on these: a judgment, nay, possibly even a comment, upon them would besmire the Bench. That course which alone is safe is, leave the domain of public need or claim or advantage to the undisturbed possession of Parliament and its delegates. I accordingly agree that a plea put forward by a subject against a Government, grounded upon an appeal to Courts of law as to public requirements, would be unavailing in the region of *ultra vires*. Once let the overmastering generality of the principle of regulation be affirmed, as has been done, all is lost; the law itself is overmastered. The only law remaining is that which the Bench must accept from the mouth of the Government: “*Hoc volo, sic jubeo; sit pro ratione voluntas.*”

I have already suggested that “regulation” means something much more limited,—as I think much more reasonable,—and certainly more in accordance with the ordinary meaning of the word, than all this. “Regulation” means, as I have ventured to set forth, the formulation of rules in the interests of public safety or defence—rules of action, behaviour, and conduct—in obedience to which the citizens may co-operate for these ends, and for disobedience to which they may be punished. But the regulation now challenged is not of that character. It is not the formulation of a rule of action, behaviour, or conduct to be obeyed by the citizen; but it is for the summary arrest and detention of his person, grounded, and grounded

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alone, on the subject's hostile origin or association. The one or the other might, it is to be presumed in the Government's favour, form a motive, a temptation, a spring, all in a region incapable of proof but prolific in suspicion, for something inimical to public safety or defence. The subject may never have dreamed of such inimical conduct: he may be ardently attached to this country's interests and cause, or he may not. Let the power go forth though it may involve the innocent with the guilty, and in such a way that that issue of innocence or guilt can never be determined; let the public end sanctify, as may be the case, this private wrong: the generality of a power to issue a regulation covers the case; it is *intra vires*.

We shall have to consider in a little while how much on this principle of generality,—this principle that during the war the Government may do what it likes—how much is repealed. Let us pursue the inquiry as to how much the power embraces. Against regulations, in their generality, as thus construed, nothing can stand. No rights, be they as ancient as *Magna Carta*, no laws, be they as deep as the foundations of the Constitution: all are swept aside by the generality of the power vested in the Executive to issue "regulations." "*Silent enim, leges inter arma.*"

I observe that this is supported by the following argument, namely, that the provisions of the sub-section embrace two parts—namely, prevention and punishment; that these are two separate things; and that what has been done here is prevention and is not punishment. This last may sufficiently surprise those who are subjected to it; but "*stone walls do not a prison make.*" Those interned are being cared for, watched over, prevented, not punished. Very different, and very properly different, from this was the view of Blackstone (*Commentaries*, i. 136): "*The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment.*"

Further, my Lords, I am humbly of opinion that the attempted distinction fails; and that in no event could it have the slightest bearing upon the point of construction to be determined.

For it is when, and only when, the sub-section comes to categorize the heads and particulars of public safety and defence to which

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H. L. (E.) the regulations might be directed that the word "prevent" occurs.  
 1917 The regulations are for preventing certain things and for securing  
 ~~~~~  
 REX other things—for preventing (1.) communication with the enemy,
 v. (2.) spreading false reports, &c., and (3.) assisting the enemy ; and
 HALLIDAY. for securing (1.) safety of forces, ships, railways, or harbours,
 ~~~~~  
 Lord Shaw of (2.) navigation according to Admiralty direction. This is the  
 Dunfermline distinction, if it be a distinction—namely, between preventing and  
 ~~~~~  
 securing. But, when punishment is dealt with, such a distinction
 no longer holds ; and if there be disobedience to regulation upon
 all or any one of these heads and particulars, whether for preventing
 danger or securing safety, then punishment may follow. The
 statute is careful to prescribe punishment for all. Punishment is
 not distinguished from either preventing or securing ; it applies
 to disobedience or offence under both the latter heads alike.

How then, I respectfully ask, how then can it be thought possible
 to construe the sub-section as meaning not only the grant of a
 power of prevention from doing certain things, which done shall
 be punishable, but the reserve of some other and super-eminent
 power of prevention, which is distinguished from punishment ?
 There is no such reserve and no such distinction in the Act of
 Parliament. There might have been, but there is not ; and the
 fact that this is so is a strong confirmation of the view that Parlia-
 ment never intended the vesting of the Executive with arbitrary
 power, but gave power to set up a code of conduct and action and
 to reach the region of punishment when, and only when, that code
 was broken.

I pursue the consideration of the question how much the principle
 of generality, thus defended, embraces. Having limited the prin-
 ciple in the matter of time, and there being no other limitation,
 let us see what Government may do under this head of "regulation"
 and start with the one in hand. It is, "in view of the hostile origin
 or associations" of any person, to intern him without trial or
 chance of trial—by force, and not by process of law.

But does the principle, or does it not, embrace a power not over
 liberty alone but also over life ? If the public safety and defence
 warrant the Government under the Act to incarcerate a citizen
 without trial, do they stop at that, or do they warrant his execution
 without trial ? If there is a power to lock up a person of hostile origin

and associations because the Government judges that course to be for public safety and defence, why, on the same principle and in exercise of the same power, may he not be shot out of hand? I put the point to the learned Attorney-General, and obtained from him no further answer than that the graver result seemed to be perfectly logical. I think it is. The cases are by no means hard to figure in which a Government in a time of unrest, and moved by a sense of duty, assisted, it may be, by a gust of popular fury, might issue a regulation applying, as here, to persons of hostile origin or association, saying, "Let such danger really be ended and done with; let such suspects be shot." The defence would be, I humbly think, exactly that principle, and no other, on which the judgments of the Courts below are founded—namely, that during the war this power to issue regulations is so vast that it covers all acts which, though they subvert the ordinary fundamental and constitutional rights, are in the Government's view directed towards the general aim of public safety or defence.

Under this the Government becomes a Committee of Public Safety. But its powers as such are far more arbitrary than those of the most famous Committee of Public Safety known to history. It preserved a form of trial, of evidence, of interrogations. And the very homage which it paid to law discovered the odium of its procedure to the world. But the so-called principle—the principle of prevention, the comprehensive principle—avoids the odium of that brutality of the Terror. The analogy is with a practice, more silent, more sinister—with the *lettres de cachet* of Louis Quatorze. No trial: proscription. The victim may be "regulated"—not in his course of conduct or of action, not as to what he should do or avoid doing. He may be regulated to prison or the scaffold. Suppose the appellant had been appointed for execution. Public outcry, public passion, public pity—these I can conceive; but I cannot conceive one argument upon the legal construction of this Act of Parliament that would have been different from the one which is now affirmed by Courts of law. It is this last matter with which these are concerned. In my humble opinion the construction is unsound. I think that if Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulations for

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The use of the Government itself as a Committee of Public Safety has its conveniences, has its advantages. So had the Star Chamber. "The Star Chamber," says Maitland (*Constitutional History of England*, p. 263), "examining the accused, and making no use of the jury, probably succeeded in punishing many crimes which would otherwise have gone unpunished. But that it was a tyrannical court, that it became more and more tyrannical, and under Charles I. was guilty of great infamies, is still more indubitable." And then occur his memorable words: "It was a court of politicians enforcing a policy, not a court of judges administering the law."

There is the basic danger. And may I further emphatically observe that that danger is found in an especial degree whenever the law is not the same for all, but the selection of the victim is left to the plenary discretion whether of a tyrant, a committee, a bureaucracy or any other depositary of despotic power. Whoever administers it, this power of selection of a class, and power of selection within a class is the negation of public safety or defence. It is poison to the commonwealth.

For within the range even of one regulation—say to affect "persons of hostile origin or association"—no one can say where the axe will fall. That description applies in all ranks and classes of society. That is why I feel constrained to dissent respectfully from the suggestion that in administering this power over liberty we ought to trust the Government. With a change of Government even during the war this very engine may be turned against its own authors. There may be such a change in the extent and lines of such a Government's discretion as to turn the engine against new bodies of citizens, a new selection within the same class, or a new selection of a class. Such zigzags and ups and downs in the region of individual liberty are on this construction possible without even altering the words of an existing regulation, once you are committed to the view that it falls within a delegation, so immense, implied in words from the Act.

And once you have abandoned the line of safety which I have sketched—namely, confining regulations to rules of conduct to be obeyed with safety or punished after trial for the breach—once that

is abandoned, how far may you not go ? Once a discretion over all things and persons and rights and liberties, so as to secure public safety and defence, what regulations may issue ? This one is founded on "hostile origin or associations." It enters the sphere of suspicion, founded not on conduct but on presumed opinions, beliefs, motives, or prepossessions arising from the land from which a person sprang. This is dangerous country ; it has its dark reminders. It is the proscription, the arrest of suspects, at the will of men in power vested with a plenary discretion. If the power to issue regulations meant thus to warrant a passage from proof to suspicion and from the sphere of action to the sphere of motive or the mind, let us think how much this involves.

No far-fetched illustrations are needed ; for, my Lords, there is something which may and does move the actions of men often far more than origin or association, and that is religion. Under its influence men may cherish beliefs which are very disconcerting to the Government of the day, and hold opinions which the Government may consider dangerous to the safety of the realm. And so, if the principle of this construction of the statute be sound, to what a strange pass have we come ! A regulation may issue against Roman Catholics—all, or, say, in the South of Ireland, or against Jews—all, or, say in the East of London,—they may lose their liberty without a trial. During the war that entire chapter of the removal of Catholic and Jewish disabilities which has made the toleration of Britain famous through the world may be removed—not because her Parliament has expressly said so, but by a stroke of the pen of a Secretary of State.

Vested with this power of proscription, and permitted to enter the sphere of opinion and belief, they, who alone can judge as to public safety and defence, may reckon a political creed their special care, and if that creed be socialism, pacifism, republicanism, the persons holding such creeds may be regulated out of the way, although never deed was done or word uttered by them that could be charged as a crime. The inmost citadel of our liberties would be thus attacked. For, as Sir Erskine May observes, this is "the greatest of all our liberties—liberty of opinion."

All this, upon analysis, is what the Government through its law officers claims at the Bar of this House, and what is involved in the

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H. L. (E.) construction adopted by the Courts below. In my opinion the  
 1917 words of the statute cannot be stretched to bear anything so repug-  
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 REX nant to liberty and the law.

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 HALLIDAY. I pass now from what the Act says and does to consider what, upon
 the vast implication given to its few words, it repeals.

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My Lords, I do not think it any mistake to suggest that in substance it repeals the Habeas Corpus Acts, the 31st of Charles II. and the 56th of George III. The Habeas Corpus Acts are, it is true, procedure Acts. In one sense they confer no rights upon the subject, but they provide a means whereby his fundamental rights shall be vindicated, his freedom from arrest except on justifiable legal process shall be secured, and arbitrary attack upon liberty and life shall be promptly and effectually foiled by law. Formally in this case the writ of habeas corpus was allowed. It is now being tried. But what has been done by the Courts below is to give due formal respect to the procedure of remedy, but to deny the remedy itself by inferring the repeal of those very fundamental rights which the remedy was meant to secure. This is to allow the subjects of the King by law to enter the fortress of their liberties only after that fortress has been by law destroyed.

As will be seen in a moment, it is not that the habeas corpus has been repealed; it is not, as in so many trying periods of history, that it has been suspended. There is a repeal and a suspension much more drastic than that. There is a constructive repeal which has, so far as I am aware, no parallel in our annals—a getting behind the habeas corpus by an implied but none the less effective repeal of the most famous provisions of Magna Carta itself. It is well settled that once liberation under the writ has been granted “the legality of that discharge could never be brought in question”: *Cox v. Hakes* (1); but in pronouncing judgment to that effect Lord Halsbury used language which I here adopt on the wider problem now in hand: “Your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed.”

I go accordingly at once to the notable 39th and 40th chapters of Magna Carta, wrung from John in June, 1215.

Mr. McKechnie (Magna Carta, 1914 ed., p. 375) translates them thus. His version is of set purpose literal :

“XXXIX. No freeman shall be taken or [and] imprisoned or disseised or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.

“XL. To no one will we sell, to no one will we refuse or delay, right or justice.”

The learned author justly observes : “ Its object was to prohibit John from resorting to what is whimsically known in Scotland as ‘Jeddart justice.’ It forbade him for the future to place execution before judgment.” And on the words “nec super eum ibimus nec super eum mittemus” he remarks in the same spirit : “ Their object was to prevent John from substituting violence for legal process. . . . He must never again attack per vim et arma men unjudged and uncondemned.”

If there be any, my Lords, who in this time of storm and stress think these chapters useless reading or their lesson out of date, I am not of their number. I remember the penetrating judgment of Hallam on that very topic. After citing these chapters of the Charter that great author observes (“Middle Ages,” 6th ed., vol. 2, p. 449) : “ It is obvious, that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the aera, therefore, of King John’s Charter it must have been a clear principle of our Constitution that no man can be detained in prison without trial. Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became from that aera the right of every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II., but founded upon the broad basis of Magna Carta, is the principal bulwark of English liberty ; and if ever temporary circumstances, or the doubtful plea of political necessity, shall lead men to look on its denial with apathy, the most distinguishing characteristic of our Constitution will be effaced.”

Speaking for myself, and again coming back to the words to be

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H. L. (E.) construed, namely, "His Majesty in Council has power during the
 1917 continuance of the war to issue regulations for securing the public
 REX safety and the defence of the realm," I decline to believe that Parlia-
 v. ment ever did or intended to do by these words those stupendous
 HALLIDAY. things—to remove "the two main rights of civil society," to repeal
 Lord Shaw of "the clear principle of our Constitution that no man can be detained
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 characteristic of our Constitution."

In *Darnel's Case* (1) Coke's great argument had embraced the famous propositions: "I. No man can be imprisoned upon will and pleasure of any but a bondman or villein. II. If a freeman of England might be imprisoned at the will and pleasure of the King or by his command, he were in worse case even than a villein . . . and III. A freeman imprisoned without cause is civilly dead." And in commenting on the case so staid an author as Broom delivers himself (Constitutional Law, 2nd ed., p. 223) thus: "This great constitutional remedy [the writ of habeas corpus] rests upon the common law declared by Magna Carta and the statutes which affirm it; rests, likewise, on specific enactments ensuring its efficiency, extending its applicability, and rendering more firm and durable the liberties of the people. . . . and the right to claim it cannot be suspended, even for one hour, by any means short of an Act of Parliament."

How hollow and worthless to the appellant is the concession of a trial of his writ of habeas corpus when the basis of his possible liberation is constructively denied! The method is not unknown to English history, but history in darker times: the method of despotism; the tyrannical fiat of the King in Council; and compliance to that as law.

It brings back to mind the constitutional struggle of 1628 and the very language of the Petition of Right: "And whereas," says ch. 2, "alsoe by the Statute called the Great Charter of the Liberties of England, it is declared and enacted that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customes or be outlawed or exiled or in any manner destroyed, but by the lawful judgment of his peeres or by the law of the land Nevertheless [ch. 5] against the tenor of the said statutes, and other

(1) (1627) 3 St. Tr. 1, 128.

the good lawes and statutes of your realme to that end provided, divers of your subjects have of late been imprisoned without any cause shewed : And when for their deliverance they were brought before your justices by your Majesties writts of habeas corpus, there to undergoe and receive as the Court should order, and their keepers commaunded to certifie the causes of their detayner, no cause was certified, but that they were detained by your Majesties speciall commaund signified by the Lords of your Privie Councell, and yet were returned backe to severall prisons without being charged with any thing to which they might make aunswere according to the lawe. . . . They doe [ch. 8] therefore humblie pray your Most Excellent Majestie . . . that no freeman in any such manner as is before mencioned be imprisoned or detained." The grant of this Petition was wrung from Charles I., and it entered the Statutes of the Realm. And this, too, this second charter of liberty, has been borne to the ground by the tremendous sweep of an implied repeal !

The list need not be enlarged ; it would include the Bill of Rights itself.

But I will venture to cite one Scotch Act which ranks deservedly high as a charter of fundamental liberties and a security against prolonged incarceration without being brought to trial. It is the Act of 1701. It was entitled "An Act for Preventing Wrongful Imprisonment and against Undue Delay in Trials."

Scotland had been greatly exercised over the excesses of arbitrary power of the later Stuarts, and liberty and life had been ruthlessly sacrificed to arbitrary power. It had no Magna Carta, no Habeas Corpus Act ; but it had a loosely defined system of making application for liberation grounded on the right to be duly and properly charged, and to be tried with reasonable promptitude. By the Act of 1701—not to enter into details—it was provided that a person incarcerated could run his letters, the effect being to charge all concerned, both prosecutor and Courts of law, that tried he must be within sixty days, and if not so tried he must be set free. A further period of forty days was allowed in which new criminal letters could run. Should that period expire without the trial having been conducted and actually brought to a verdict, then on the 101st day the subject was free, and free for ever, from the charge. Magistrates or gaolers who dared to detain him were guilty of wrongous

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H. L. (E.) imprisonment, and for them punishment was prescribed. The Act
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has always been a prized constitutional possession of the Scottish people. This case is English, but for aught I know there may have been in Scotland similar cases: persons may have been interned there as here for a period of eighteen months under a fiat of the Secretary of State. And I presume that that arbitrary act would be defended under the same argument that constitutional rights and liberties, however fundamental and however prized, are all under eclipse, because a regulation for public safety and defence has been expounded and construed to mean a repeal of, *inter alia*, the Act of 1701. My Lords, I repeat that I think this brief expression in the recent Act will not bear this extraordinary strain.

Nor do I overstate the value attached to that statute even by the most learned authors.

Burnett (*Treatise on Various Branches of the Criminal Law of Scotland*, p. 316) is loud in praise of the Act. In his commentary on it he says: "The objects indeed of this statute are of the first importance to the security and happiness of every individual of the community; inasmuch as *the injury of unjust and illegal confinement*, while it is often the most difficult to guard against, is in its nature the most oppressive and the most likely to be resorted to by an arbitrary Government." He re-echoes the words of Blackstone, saying that the Act of 1701 may be justly termed the Magna Carta of Scotland. And he sums up his eulogy by observing that the Act "may justly be considered as more favourable to the subject than the boasted Habeas Corpus Act of England." No one will accuse Baron Hume of having been the enemy of vigorous government. But even he says, *apropos* of the great statute (*Commentaries on the Law of Scotland respecting Crimes*, vol. 2, p. 98): "It is obvious that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law,—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried,"—(the very case that is now before your Lordships' House) "nay, it may be, not informed of the charge against him, or the name of the accuser." How strangely in Hume's ears would have sounded the argument that a law had been passed giving power to the King in Council to issue regulations for public safety and defence, and that this meant

the repeal of the great Act itself and the reintroduction into our Constitution and our jurisprudence of "the greatest and most dangerous of all abuses of the forms of law."

Nor has the refusal lightly to imply the repeal of laws and liberties fundamental to British citizenship been confined to these islands. It has been far more widely extended. A notable instance of this is the case of *Sprigg v. Sigcau* (1), brought on appeal to the Privy Council from the Cape of Good Hope. Sigcau was the independent native chief of Pondoland. Pondoland was in 1894 ceded to the British Crown, and Sigcau then accordingly became one of His Majesty's subjects. An Act of the Cape Legislature was passed, and s. 2 thereof provided that the territories "shall be subject to such laws statutes and ordinances" as "the Governor shall from time to time by Proclamation declare to be in force in such territories." This language was indeed general.

In June, 1895, Sigcau was arrested and imprisoned by virtue of a Proclamation issued by Sir Hercules Robinson as Governor that "the said Sigcau has by his acts in disregard and defiance of the law rendered himself liable to arrest"; and there was a proviso very much on the lines of the proviso in the present case, that after inquiry, "and in case it may be possible to do so without jeopardy to the interests of the public peace and order" the Governor might order release and appoint a selected place for the chief's residence.

He petitioned the South African Courts, and the Supreme Court of the Cape Colony, presided over by Lord de Villiers, ordered his release, although this had been opposed by Mr. Rhodes as Prime Minister and Secretary for Native Affairs and by the Attorney-General of the day on the grounds of public safety.

On appeal to the Privy Council this judgment was confirmed by one of the strongest Judicial Committees that ever sat. Lord Watson said: "Their Lordships think it sufficient for the disposal of this appeal to point out that the Proclamation . . . exceeds any delegated authority which was possessed by the Governor in two particulars which constitute its leading features. It is a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes and ordinances which he is authorised to proclaim; and it in substance repeals the whole provisions of the

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(1) [1897] A. C. 238, 244-5, 248.

H. L. (E.) existing law with, respect to criminal proceedings, in so far as the
 1917 respondent is concerned. Upon these grounds, their Lordships are
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 REX of opinion that the issue of the Proclamation was an illegal and  
 v. unwarrantable act." And the liberation of Sigcau was confirmed.  
 HALLIDAY. The entire case as reported is an instructive example of the manner  
 Lord Shaw of in which the defence of ordinary and constitutional legal rights of a  
 Dunfermline. British citizen ought to be supported by Courts of law even in times  
 of stress as against the pretensions of authority when vested merely  
 with the authority of general words of power.

My Lords, I pass from the subject of repeal to the further proposition that what has been done on the implication supposed is alien to the practice of the Constitution. On many occasions in this island has the attention of the Legislature been called to the subject of exceptional legislation in view of foreign attack, political unrest, or civil war. And the mode of dealing has been frank, firm, and open—namely, a temporary suspension of the Habeas Corpus Act. When the authority of the King in Council was stretched out to interfere with liberty or life and to undermine the securities thereof in Magna Carta and the Habeas Corpus Acts, public unrest might grow, even a dynasty might accelerate its own ruin, but Parliament would reassert itself and sharply bring the peril to an end. But when Parliament itself devoted its energies to the task it took it up in no casual manner and left its action in no form so covert that the Bench had to expand inferentially its meaning.

Blackstone is quite clear upon the practice of the Constitution (Comm. i. 136). He searchingly treats the cases both of liberty and life as tests, both and equally, of one and the same principle, the very principle which is under scrutiny in the present case. "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the State is in real danger, even this may be a necessary measure. But the happiness of our Constitution is, that it is not left to the Executive power to determine when the danger of the State is so

great, as to render this measure expedient. For it is the Parliament only, or legislative power, that, whenever it sees proper, can authorise the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing."

It would take too long to enumerate the instances in English history in which this course has been followed. No instance was advanced in argument when the method was not adopted but the end reached by other means. But I will venture to recount one striking case in the close of the eighteenth century—interesting because the cases of England and Scotland were each distinctively treated, and in both the constitutional rights guaranteed by statute were recognized, and temporary suspension and repeal were accomplished, overt and express.

Everyone's mind in Europe was stirred by the events of 1789 to 1793, and the execution of Louis XVI. and his queen in the latter year precipitated parliamentary action here. But it was careful action. In 1794 the Act 34 Geo. 3 was passed. It proceeded upon the preamble: "Whereas a traitorous and detestable conspiracy has been formed for subverting the existing laws and Constitution, and for introducing the system of anarchy and confusion which has so fatally obtained in France." It enacted for England that persons that are or shall be in prison by a warrant of the King and six Privy Councillors, or by warrant of a Secretary, for treason or treasonable practices may be detained "without bail or mainprize" till February 1, 1795, and no judge should release them, "any law or statute to the contrary notwithstanding." This was plain language: it followed constitutional practice; for some months and in defined cases the Constitution was suspended.

How was Scotland dealt with? In 1707 the Union of the Parliaments had been effected; but the great Act of the Scotch Parliament in 1701 was now, in 1794, fully and separately recognized. It was enacted that the Act made in Scotland in the year of our Lord 1701, "in so far as the same may be construed to relate to cases of treason and suspicion of treason, be suspended" until the same fixed date, namely, February 1, 1795, and then the following notable proviso follows—namely, "Provided always, that, from and after the said first day of February, one thousand seven hundred and ninety-

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five, the said persons so committed shall have the benefit and advantage of all laws and statutes any way relating to or providing for the liberty of the subjects of this realm, and that this present Act shall continue until the said first day of February, one thousand seven hundred and ninety-five, and no longer.”

That, my Lords, is an ordinary and a fair sample of our constitutional practice, and of the express, the watchful, the clearly limited, and the scrupulously careful handling of our fundamental liberties whenever these are meant to be affected. Judged in the light of that practice the wide and entirely inferential construction of words about regulations for safety and defence which has been adopted by the Courts below seems to be the last resort of interpretation and to be strikingly condemned.

And before I leave the topic I may observe as bearing on the intention of the Legislature that where, in this very Act of 1914, suspension or repeal or a transaction of that nature was truly meant, Parliament knew perfectly well how to accomplish its object, and did so. By the second sub-section of the very s. 1 which is under construction it is provided that “any such regulations may provide for the suspension of any restrictions on the acquisition or user of land” under the Defence and other Acts, and may supersede any enactments, &c., as to pilotage. It is to my mind inconceivable that Parliament, expressly suspending and repealing certain laws about property or pilotage, should have refrained from doing so, if it had meant to do so, in the infinitely weightier matters of the law and left the suspension and repeal of these to be implied. I do not think on ordinary principles of interpretation such a thing as this vast suspension and repeal can be inferred by law.

My Lords, the House is in possession of my construction of the words giving power to the Government to make regulations. That construction is simple. It does violence to no language. Under it regulations play their useful and their helpful part. It is entirely consistent with the rest of the Act. It operates no repeal of any statutes of the realm. It leads to no startling or absurd results and to no upheaval of constitutional right.

In every one of these particulars it appears to be in accord with those principles of the interpretation of statutes which are embedded in our law and are unquestionable.

Differing as I unfortunately and respectfully do from your Lordships, it would not be right that I should fail to add that the expanded construction adopted by the Courts below appears to me in every one of these particulars to be inconsistent with those principles of interpretation which have been long recognized. It is, I humbly think, not simple, but strained. It is repugnant to the rest of the Act. It operates repeal of statutes on an important and vast scale. It leads to startling and absurd results and to an upheaval of constitutional right.

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My reasons and exposition on each of these topics are before the House. I do not think the application of legal doctrine to them is doubtful. To that I come, taking them in their order.

In the first place, my Lords, I strongly protest against the view of the Courts below of the words of the Act being taken as a literal view. The appellant has been (1.) interned, (2.) without a trial, (3.) because he is of hostile origin or associations. Parliament never said in words any one of those things. They are and are alone inferences—inferences from the delegation of a power, a power to make regulations for safety and defence. As to what may be done under such a power may be matter of far-reaching inference or wide and deep speculation, but these things do not touch the literal rule, the rule as to grammatical and ordinary sense of the actual words employed in the Act itself—the rule of Lord Wensleydale in *Grey v. Pearson*. (1) That rule does not go far in any case of difficulty; but, in so far as it may be held to have a bearing on this case, it leaves conspicuous force to the observation that if Parliament had really meant to sanction internment without trial for the cause assigned it could have said so without the slightest difficulty, and not left a point which, I think, is so fundamental to be reached by inference.

I may add, my Lords, that, holding as I do that Parliament never intended to construct an instrument of violent and arbitrary power, but to do a much more helpful and reasonable thing, I should have come to the same conclusion even though the language had been much more plain and definite than it is. To adopt the familiar language of Lord Selborne in *Caledonian Ry. Co. v. North British Ry. Co.* (2), “The more literal construction ought not to prevail,

(1) (1857) 6 H. L. C. 61, 106.      (2) (1881) 6 App. Cas. 114, 122.



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if . . . it is opposed to the intentions of the Legislature, as
 apparent by the statute ; and if the words are sufficiently flexible
 to admit of some other construction by which that intention will
 be better effectuated." I refer also on this head to the judgments
 of Jessel M.R. and James L.J. in *Ex parte Walton*. (1)

I turn from literal construction—which is not this case—to ask
 whether the construction of inference or implication is consistent
 with or repugnant to the rest of the Act ? So consistent is the
 interpretation which I have ventured to put upon the sub-section—
 namely, that regulations are the formulation of rules for the citizen's
 action and conduct, in obedience to which he shall be safe and in
 disobedience to which he shall on trial be punished—that all the
 rest of the Act fits in with this and makes the requisite provisions
 in great detail for trial and punishment accordingly. So repugnant
 is it to the interpretation finding favour in the Courts below—the
 interpretation that a power to issue regulations for safety and defence
 covers every power over the citizens which the Government may
 judge expedient for the object in view—that the entire remainder
 of the Act becomes surplusage. Everything could have been
 done by regulation. And indeed it does not stop there. For nine-
 tenths of the labours of Parliament are surplusage : all are covered
 by the same principle ; all could be covered by "regulations." This
 construction humbly appears to me to be opposed to legal
 principle. Two constructions are available—one of harmony and
 consistency, the other of overriding and repugnancy. In my view,
 in all such cases it is reasonable and according to law that the
 former be preferred.

Upon the last point—namely, that the construction upheld
 implies a repeal of the ancient liberties and rights of our people and
 of statutes both south and north of the Tweed which have been
 their protection in the enjoyment of these—your Lordships have
 already had a statement of my views. No repeal like this, or in
 this manner, at once so sweeping and so covert, has ever been
 accomplished in the modern history of this island. That Parliament
 should have entertained such an intention of repeal I do not believe ;
 that it would have recoiled from putting such an intention of repeal
 into words I can well understand. The law on such a subject is

beyond doubt or question. Such an intention is the very last resort of a Court of construction.

Your Lordships have already heard my citation from Blackstone. It holds the field. It still represents, in my opinion, both the law of the land and the practice of the Constitution. Both may have been revolutionized by the stupendous repeal implied from the words of this Act. I do not think there is any such repeal, either in word, in implication, or in intention.

In the latest edition of Maxwell on the Interpretation of Statutes, p. 268, I find the law exactly as I view it stated thus: "Repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

The construction I have ventured to propose appears to me to be not unreasonable, but to square with every familiar and accustomed canon. I think that the judgment of the Courts below is erroneous, and is fraught with grave legal and constitutional danger. In my opinion the appeal should be allowed, the regulation challenged should be declared *ultra vires*, and the appellant should be set at liberty.

LORD WRENBURY. My Lords, the question is whether reg. 14B under the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), is *ultra vires*. I turn to the Act at once to see what upon its terms are the characteristics—the scope, the purpose, the limits, and the character—of the regulations which the Act allows. I shall then go on to inquire whether the regulation in question falls within them.

Sect. 1, sub-s. 1, of the Act of 1914 is an empowering section. It gives power to His Majesty in Council within a limit of time—"during the continuance of the present war"—to issue regulations for a defined purpose—"for securing the public safety and the

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H. L. (E.) defence of the realm." It goes on to provide that the regulations
 1917 may contain provisions "as to the powers and duties for that pur-
 REX pose" of certain stated administrative bodies and persons. It adds
 v. that the regulations may authorize the trial in defined ways and the
 HALLIDAY. punishment of persons committing offences against the regulations,
 Lord Wrenbury. and in particular against any of the provisions of regulations
 designed to prevent certain acts or secure certain results described
 under five heads (a) to (e).

This is a section (1.) empowering the issue of regulations for a defined purpose; (2.) providing machinery for effectuating the purpose; (3.) adding means for enforcing the purpose; and (4.) stating in heads (a) to (e) particular instances of acts to be prevented and results to be secured. Thus Nos. (2.), (3.), and (4.) are subsidiary provisions for illustrating and effectuating the dominant purpose No. (1.).

This Act repealed and consolidated with amendments two previous Acts—namely, 4 & 5 Geo. 5, c. 29, and 4 & 5 Geo. 5, c. 63. For the present purpose the first material observation upon these is that the consolidating Act altered the sequence of the language and enlarged in a material particular the effect of the Acts which it repealed. The Act 4 & 5 Geo. 5, c. 29, did not commence, as does the Act now in force, with the dominant words giving authority "to issue regulations for securing the public safety and the defence of the realm." It commenced by authorizing regulations "as to the powers and duties [of defined bodies and persons] for securing the public safety and the defence of the realm." Upon the latter words a contention might have been open that the authority was only to make regulations controlling existing powers and duties. That contention is not open upon the words of the present Act. There is a plain authority to issue regulations for a purpose. Those are the initial and dominating words.

A second material observation is that the Act now in force extended the particular instances which in the former Act were two only, namely, (a) and (b), by enlarging (b) and adding three more, (c), (d), and (e). The additions enlarge by way of illustration, if it were needed, the field over which the regulations may extend. For all these (a) to (e) may be included in the regulations. The statute says so.

So far I am satisfied—provisionally, at any rate—that the word “regulations” in this statute does not connote something in the nature of a by-law or a rule of procedure or administration, but something much greater. The “regulation” may create an offence, e.g., obtaining information such as mentioned in sub-clause (a), and may fix the punishment for it. This is enactive.

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Looking further into the statute I find this view of the nature of a “regulation” confirmed in a manner beyond possibility of dispute. A “regulation” may affect a previously existing statute. For under s. 1, sub-s. 2, a “regulation” may provide for the suspension of restrictions imposed by existing statutory enactments. Again, under s. 1, sub-s. 6, a “regulation” may order the forfeiture of goods.

There is room for difference of opinion whether what I may call legislation by devolution is expedient; whether a statute ought not to be self-contained; whether it is desirable that a statute should provide that regulations made by a defined authority or in a defined matter shall themselves have the effect of a statute. But I think it clear that this statute has conferred upon His Majesty in Council power to issue regulations which, when issued, will take effect as if they were contained in the statute.

The appellant’s counsel, however, argue that an authority “to issue regulations for securing the public safety and the defence of the realm” does not authorize preventive detention, which is, they say, imprisonment without trial. They contend that there must be express words where the liberty of the subject is to be affected; that the general words of this statute are not enough. My Lords, I find no ground upon which this contention can be supported. For instance, the statute says in so many words that a regulation may prevent persons communicating with the enemy (sub-clause (a)). What is the man to be tried for before he is so prevented? The very purpose is not to punish him for having done something, but to intercept him before he does it and to prevent him from doing it. What limit does the statute place upon the steps that may be taken so to prevent him? There is no limit. No doubt every statutory authority must be exercised honestly. There is, I conceive no other limit upon the acts that the regulations may authorize to achieve the defined object.

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These being the provisions of the statute, reg. 14B is one which provides that where, on the recommendation of a defined authority, "it appears to the Secretary of State that, for securing the public safety or the defence of the realm, it is expedient, in view of the hostile origin or associations of any person," to intern him he may be interned. The appellant is interned under an order made under that regulation. He says the result is that the Habeas Corpus Act is in substance suspended when it has not been suspended in fact. This is a complete misapprehension. If his case were that he had neither hostile origin nor associations he could have his writ of habeas corpus on the ground that that was so, and if he established the fact he would be discharged. The application before your Lordships is for a writ of habeas corpus, and the ground advanced is that reg. 14B is ultra vires. If that were established he would be discharged. The Habeas Corpus Act is in full force; but this statute and the regulations made under it have provided machinery for achieving in a way other than that of suspending the Habeas Corpus Act the preventive detention of persons who are not alleged to have committed any offence, but whom it is desired to prevent from committing one. The regulation is, in my judgment, one within the authority given by the Act. The contention that it is ultra vires fails. It results that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 1, 1917.

Solicitors for appellant : *Warren & Warren.*

Solicitor for respondent : *The Treasury Solicitor.*

[IN THE HOUSE OF LORDS.]

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ADAM APPELLANT ;

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AND

March 22.

WARD RESPONDENT.

Defamation—Libel—Privileged Occasion—Excess of Privilege.

Upon a plea that a libel was published on a privileged occasion it is for the judge to determine whether the occasion is privileged and whether the privilege has been exceeded.

Where a libel contains defamatory matter not referable to the duty or interest which gives rise to the privileged occasion, such matter is outside the occasion and is not protected ; and such excess of privilege in part of a defamatory publication may also be evidence of malice as to the whole of it. Excessive language in regard to a matter within the privileged occasion is material only as evidence of malice, and, *semble*, in determining whether such language is evidence of malice, it will not be subjected to strict scrutiny.

A public official who, acting under the direction of his principals, signs and publishes a libel takes the benefit of the privilege of his principals and is liable for their malice ; and, *semble*, evidence of malice on his part is irrelevant.

The plaintiff, who was formerly an officer in a cavalry regiment and was subsequently elected a member of Parliament, in a speech in the House of Commons, falsely charged the General commanding the brigade of which his late regiment formed part with sending confidential reports to Headquarters on officers under his command, containing wilful and deliberate misstatements. The General having referred the matter to the Army Council, the defendant, as secretary to the Council and by their direction, wrote a letter to the General, vindicating him against the charge made by the plaintiff and containing defamatory statements about the plaintiff, and sent it to the Press for publication. The letter was widely published in the British and Colonial Press. In an action for libel by the plaintiff against the defendant, the defendant pleaded that the letter was published on a privileged occasion :—

Held : (1.) That the occasion was privileged and that there was no evidence of malice on the part of either the Council or the defendant ; (2.) that, having regard to the circumstances under which the plaintiff's charge was made, the publication of the libel was not unreasonably wide ; (3.) (Earl Loreburn doubting

* *Present* : LORD FINLAY L.C., EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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but not dissenting) that in the special circumstances of the case the defamatory statements were strictly relevant to the vindication of the General, and that the whole of the letter was protected.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal (Buckley L.J., Pickford L.J., and Bankes L.J.) reversing a judgment of Darling J. in an action for libel brought by the appellant against the respondent, in respect of a letter, dated August 5, 1910, written by the respondent, as secretary to the Army Council and by their direction, and issued by him to the Press by order of the Council. The sole defence relied on by the respondent was that the letter was published on a privileged occasion.

The following statement is taken from the judgment of the Lord Chancellor :—

“ The facts, so far as they are material, lie in very short compass.

“ Major Adam, the plaintiff and appellant, was an officer in the 5th Lancers, in 1906, stationed at Aldershot. The commanding officer of his regiment was Colonel Graham, who in the autumn of 1906 made a confidential report with regard to Major Adam. This report was submitted to Major-General Scobell, and was by him transmitted, together with notes of his own upon it, to General Sir John French, who was General Officer Commanding-in-Chief at Aldershot. This report, with the notes upon it, is in the evidence called the ‘ combined report.’ It was not shown to Major Adam before being sent in, as it ought to have been by the King’s Regulations, but it was shown to him some weeks later—about December 6, 1906. On November 3, 1906, Sir John French sent in a confidential report of his own with regard to Major Adam. Neither of these reports was produced at the trial, as the Secretary of State stated that it was contrary to the public interest that they should be put in evidence.

“ A letter dated December 1, 1906, was sent from the Army Council to Sir John French, stating, with reference to a letter of his of November 3, reporting the unsuitability of Major Adam as a cavalry leader in the field, that after full consideration of the circumstances of the case it had been decided that he should be called upon to forward an application to retire from the Service, failing which it

would be necessary to submit for His Majesty's approval his removal from the Army, and that Sir John French was requested to communicate this decision to Major Adam. Major Adam wrote begging for a reconsideration of this decision, or, failing that, for the longest possible grace before sending in his papers, in order that he might get something to do, and in the result, owing to the good offices of Major-General Scobell, Major Adam was given a post in the office of the Chief of the General Staff. He remained at this post until January, 1910. On October 18, 1907, it was announced that he and four other officers were to be placed on half-pay, and on November 30 of the same year a communiqué appeared stating that this action was not due to any cause detrimental to the character of these officers, and that, though they were not considered suitable to retain their positions as officers in the 5th Lancers, their services could be, and in three cases were being, utilized in other appointments, and that the regiment was not inefficient to take the field.

"In October, 1909, Major Adam asked that the circumstances under which he was placed on half-pay should be reconsidered with a view to his reinstatement on full pay, but he was informed by a letter of November 3 that his case had been carefully considered and that the Army Council saw no reason to reopen the question.

"In January, 1910, Major Adam was returned as member of the House of Commons for Woolwich, and vacated his staff appointment.

"On June 27, 1910, he made a speech in the House of Commons in which he referred to the case of Captain Bryce-Wilson, one of the five officers who had been placed on half-pay, and read out in the House the following statement: 'That Major-General H. J. Scobell, Royal Irish Lancers, did render to superior authority a confidential report or confidential reports on an officer or officers under his command, which report or reports contained wilful and deliberate misstatements of fact, thereby deceiving those in authority to whom the report or reports were rendered, and causing injustice to be done to one of the regiments under his command.'

"Major Adam then went on to say, according to the report in 'Hansard,' which was in evidence: 'Major-General Scobell is on his way home at the present time from South Africa. He arrives in England at the end of this week, and I hope when he sees the report

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of this in the paper, as I intend he shall do, he will appreciate the meaning of the words, "wilful and deliberate misstatement of facts." I have tried to make it clear, and I hope he will turn up that paragraph in the King's Regulations which compels an officer in a case like this to refer the matter to his superior authority, the superior authority in this case being the Army Council. I hope sincerely that the Army Council will see that justice is done to Captain Wilson and that penalties are meted out to those officers who deserve it."

In reference to this speech the Lord Chancellor said: "This speech must have conveyed to every one who heard it or read the report the impression that Major-General Scobell was charged with conduct unworthy of an officer and a gentleman within the meaning of the King's Regulations. It is impossible to suppose that Major Adam did not intend to convey this impression. At the trial, however, he stated that he did not impute such unworthy conduct to Major-General Scobell, and that he said what he did merely in order that Major-General Scobell might demand an inquiry to clear himself, in the course of which Major Adam believed information might be obtained with regard to the attack upon him which he believed to be contained in the combined report.

"I abstain from comment upon Major Adam's conduct in making, for such an indirect purpose, an unfounded attack upon General Scobell, who had rendered Major Adam great service at the time of his removal."

His Lordship then continued: "Major-General Scobell brought the matter before the Army Council, who, after investigating it, issued through the Press the letter which is complained of as a libel upon Major Adam, and which forms the subject of this action. It was addressed to Major-General Scobell, and is as follows:—

"In reply to your letter of July 8th, 1910, asking that an enquiry should be instituted in regard to a statement made by Major W. A. Adam, M.P., in the House of Commons on June 27th to the effect that while in the command of the 1st Cavalry Brigade you rendered confidential reports on certain officers which reports contained wilful and deliberate misstatements of facts, I am commanded by the Army Council to inform you that a thorough investigation has been made of the reports made by you at that time on certain officers of the 5th Lancers, who were afterwards removed from the regiment,

and to whom it is believed that Major Adam's statement bore reference. Major Adam is himself one of these officers. The Council also thought it proper to address a letter to Major Adam on the 23rd ultimo, inquiring whether he desired to forward for their consideration any statement in amplification or substantiation of his charge against you. On the 29th idem a reply was received from Major Adam to the effect that he had written to the Secretary of State for War on the subject, but his letter of the same date to the Secretary of State is found to contain nothing pertinent to the present investigation. The Council are satisfied that not only did your reports contain the unbiassed and conscientious opinion you had formed on the officers in question, but that the conclusions at which you arrived were correct, as they were afterwards borne out not only by the opinion of your successor in command of the 1st Cavalry Brigade, but also by a special report on the 5th Lancers made by H.R.H. the then Inspector-General of the Forces, and confirmed by the General Officer then Commanding-in-Chief the Aldershot Command. Further, as showing the absence of hostile bias, the Army Council note that in the case of Major Adam, who in 1906 was called upon to retire from the service in consequence of adverse reports, which were duly communicated to him, you intervened on his behalf and urged the Council to give him another chance in an extra regimental appointment. In the result it was decided to give Major Adam this chance. I am to add that the Council are of opinion that the charge brought against you by Major Adam is without foundation.'

"The action was brought on November 14, 1912, against Sir E. Ward, by whom, as secretary to the Army Council, the letter complained of had been signed and issued to the Press in obedience to the orders of the Army Council. The defendant did not dispute that the letter was defamatory of the plaintiff but pleaded privilege.

"The case was tried before Darling J. and a special jury. Four questions were left by the learned judge to the jury. These questions, with the answers of the jury, are as follows :—

"1. Was the publication a matter of a public nature?—A. : No.

"2. Was the publication made by the defendant in discharge of his duty as secretary to the Army Council and for the purpose of affording information to the public?—Answer to both branches

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H. L. (E.) of this question : Yes. 3. Was the subject-matter of such publication by the defendant matter about which it was proper for the public to know?—A. : No. 4. Was the matter contained in the letter appropriate for the public to know?—A. : No. And the jury assessed the damages at 2000*l*.

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“Application being made for judgment, the learned judge said : ‘On these findings I hold that the publication was not a privileged publication, nor a publication on a privileged occasion, and therefore I shall enter judgment for the plaintiff.’”

“The defendant appealed to the Court of Appeal, which held that the occasion was privileged, and that there was no evidence of malice, and directed judgment to be entered for defendant. The plaintiff, Major Adam, appealed from this judgment to your Lordships’ House and asked that judgment should be entered for him, or, alternatively, that the case should be sent down for a new trial.”

Feb. 19, 20, 22, 23, 26. *Sir Hugh Fraser*, for the appellant. The libel is admitted, and the sole defence is privilege. The document complained of is a travesty of the facts, and it contains serious charges against the appellant. The plea of privilege fails on two grounds: first, because the publication was unnecessarily wide; secondly, because the defamatory statements in the letter went beyond the requirements of the occasion. As to 1: The letter was an answer to a charge made by the appellant against Major-General Scobell in Parliament, and the reply to the charge should have been made through the same channel. There was no necessity to publish the letter broadcast in the British and Colonial Press, and the publication of the letter to so large a number of persons renders it unprivileged altogether. There is no duty to publish to the world at large untrue defamatory statements unless they are protected by statute or are contained in a report of parliamentary or judicial proceedings, or proceedings in the nature of a judicial inquiry : *Purcell v. Sowler* (1); *Brown v. Croome* (2); *Lay v. Lawson*. (3) The investigation in this case was an inquiry with closed doors and was not in the nature of a judicial proceeding. As to 2: The real question is whether the statements complained of

(1) (1877) 2 C. P. D. 215.

(2) (1817) 2 Stark. 297, 301.

(3) (1836) 4 Ad. & E. 795.

were made in the discharge of a legal or moral duty and were reasonably necessary to the discharge of that duty. The law as to what constitutes a privileged occasion is laid down in the recent case of *London Association for Protection of Trade v. Greenlands, Ltd.* (1), where this House approved the well-known definition of Parke B. in *Toogood v. Spyring*. (2) There was no duty here to say anything beyond what was necessary for the vindication of Major-General Scobell. The Council, and the respondent as their agent, have gone outside what the law allowed. The defamatory statements concerning the appellant were not relevant to the purpose of the letter. They are therefore in excess of the privilege and not entitled to protection: *Hebditch v. MacIlwaine* (3); *Duncombe v. Daniell* (4); *Warren v. Warren* (5); *Senior v. Medland*. (6) At any rate, the excess is some evidence of malice: *Cooke v. Wildes*. (7) [He also referred to *Laughton v. Bishop of Sodor and Man* (8), *Nevill v. Fine Arts and General Insurance Co.* (9), and *Capital and Counties Bank v. Henty & Sons*. (10)] There is no privilege for libels published in defence of other people except where there is a special relationship, such as agent and principal or solicitor and client. This libel was not published in self-defence, and no special relationship existed between the Army Council and General Scobell.

Assuming that the occasion was privileged, there was evidence of express malice to go to the jury, and upon this point Darling J. was wrong. The respondent stands in the same position as his principals the Army Council. It is no answer to an action for libel against a public official to say that he did merely what he was told by his principals to do. It is not suggested that the Council or the respondent were actuated by personal spite against the appellant, but they published a document containing statements which they knew to be false. [Upon this point he referred to *Smith v. Streetfeild*. (11)]

At the conclusion of the arguments for the appellant :

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|-----------------------------------|-----------------------------------|
| (1) [1916] 2 A. C. 15, 22, 33-35. | (7) (1855) 5 E. & B. 328, 340.    |
| (2) (1834) 1 C. M. & R. 181, 193. | (8) (1872) L. R. 4 P. C. 495.     |
| (3) [1894] 2 Q. B. 54.            | (9) [1895] 2 Q. B. 156; [1897]    |
| (4) (1837) 8 C. & P. 222.         | A. C. 68.                         |
| (5) (1834) 1 C. M. & R. 250.      | (10) (1882) 7 App. Cas. 741, 787. |
| (6) (1858) 4 Jur. (N.S.) 1039.    | (11) [1913] 3 K. B. 764.          |

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H. L. (E.)      The LORD CHANCELLOR intimated that their Lordships desired to hear the respondent's counsel only upon the question whether the statements concerning the appellant were germane to the vindication of General Scobell.

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*Sir John Simon, K.C. (Sir Frederick Smith, A.-G., and G. A. H. Branson with him), for respondent.* Some confusion has arisen from the frequent use in the authorities of the term "privileged communication," which can only mean a document published on a privileged occasion where express malice is not proved. But the question whether the occasion is privileged is for the judge, and the question of express malice, assuming that there is evidence, whether extrinsic or intrinsic, on the point to be submitted to the jury, is for the jury: *Pullman v. Hill & Co.* (1); *Boxsius v. Goblet Frères* (2); *Edmondson v. Birch & Co.* (3); *Huntley v. Ward* (4); *Simmonds v. Dunne.* (5)

A case might conceivably arise in which a document contained two subject-matters, both containing defamatory statements, so wholly divorced from one another that the judge might rule that the occasion was privileged as regards one subject-matter but not as regards the other, but the point has never arisen for decision, although it has been mooted in several cases: *Warren v. Warren* (6); *Jacob v. Lawrence* (7); *Nevill v. Fine Arts and General Insurance Co.* (8) In such a case the fact that part of the communication was wholly irrelevant to the duty or interest which gave rise to the privilege would not destroy the privilege in regard to the whole communication, although it might afford strong evidence of malice. But any excess of language within the ambit of the subject-matter is material only in so far as it is or may be evidence of express malice. Such excess does not import malice and is not necessarily evidence of malice; to constitute such evidence the excess must be substantial: *Laughton v. Bishop of Sodor and Man* (9); *Nevill v. Fine Arts and General Insurance Co.* (10); *Spill v.*

(1) [1891] 1 Q. B. 524, 529.

(6) 1 C. M. & R. 250.

(2) [1894] 1 Q. B. 842.

(7) (1879) 4 L. R. Ir. 579,

(3) [1907] 1 K. B. 371.

584.

(4) (1859) 6 C. B. (N.S.) 514.

(8) [1895] 2 Q. B. 156, 170.

(5) (1871) Ir. R. 5 C. L. 358, 362.

(9) L. R. 4 P. C. 495, 508.

(10) [1895] 2 Q. B. 156, 170, 172.

*Maule.* (1) Applying these principles to the facts, it is material to observe that not merely did the appellant vilify General Scobell, but he was really championing his own cause, and was not acting, as he professed to be, in the public interest as a disinterested commentator. He made an attack upon General Scobell's honour, and in the reply it was relevant to show that General Scobell, so far from being actuated by malicious motives, was doing what he could to assist the appellant. All the statements complained of were strictly relevant to the vindication of General Scobell.

*Sir Hugh Fraser* in reply. It is for the judge, in determining whether the occasion is privileged, to satisfy himself that the particular communication is reasonably necessary for the discharge of the duty which gives rise to the occasion : *Henwood v. Harrison*. (2) In *Fryer v. Kinnersley* (3) the Court, in considering whether the privilege applied, took into account the evidence of the language used. "It is not enough to have an interest or a duty in making a communication ; the interest or duty must be shown to exist in making the communication complained of" : *Lynam v. Gowing* (4), per Dowse B. When it is said that there is some excess in the communication that is an ambiguous term. It may mean either that there is in the communication a statement which is not reasonably necessary for the discharge of the duty, or that the language used in a statement which is referable to the duty is stronger than is reasonably necessary. In the former case the statement is outside the privileged occasion altogether and there is no question of malice to go to the jury ; in the latter case it is for the jury to consider the language as evidence of malice : *Wright v. Woodgate*. (5) The defamatory statements in this case fall under the former category. Here the duty of the Council was not to attack the appellant but to vindicate General Scobell, and, having regard to the fact that the so-called investigation resolved itself into a consideration of confidential reports behind closed doors, it was specially incumbent on the Council not to go a step beyond what was necessary for General

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(1) (1869) L. R. 4 Ex. 232, 235.

(3) (1863) 15 C. B. (N.S.) 422.

(2) (1872) L. R. 7 C. P. 606,  
628.(4) (1880) 6 L. R. Ir. 259,  
268.

(5) (1835) 2 C. M. &amp; R. 573.

H. L. (E.) Scobell's vindication. [He also referred to *Ede v. Scott* (1) and *O'Hea v. Cork Union*. (2)]

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The House took time for consideration.

March 22. LORD FINLAY L.C. My Lords, this is an action for libel, and the questions that arise in this appeal are whether the occasion was privileged, and, if so, whether there was evidence of express malice. [His Lordship stated the facts and continued:] The law of privilege is well settled.

Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication was on what is called a privileged occasion. If the communication was made in pursuance of a duty or on a matter in which there was a common interest on the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury. It is further for the judge to decide whether there is any evidence of express malice fit to be left to the jury—that is, whether there is any evidence on which a reasonable man could find malice. Such malice may be inferred either from the terms of the communication itself, as if the language be unnecessarily strong, or from any facts which show that the defendant in publishing the libel was actuated by spite or some indirect motive. The privilege extends only to a communication upon the subject with respect to which privilege exists, and it does not extend to a communication upon any other extraneous matter which the defendant may have made at the same time. The introduction of such extraneous matter may afford evidence of malice which will take away protection on the subject to which privilege attaches, and the communication on the extraneous matter is not made upon a privileged occasion at all, inasmuch as the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication.

(1) (1858) 7 Ir. C. L. R. 607.

(2) (1892) 32 L. R. Ir. 629.

That the occasion of this letter was privileged seems to me to be clear beyond all controversy. Major Adam had made a violent attack upon the character of Major-General Scobell, who appealed to the Army Council for inquiry. It was the duty of the Army Council to inquire into the truth of this charge and to make the result of that inquiry known as widely as possible. It is said that there was unnecessary publicity given to their findings, but it must be remembered that Major Adam's speech in the House of Commons had been extensively reported, as he obviously intended it should be when he made his attack upon Major-General Scobell, and the Army Council did no more than their duty in giving a wide publicity to their finding that the charge was unfounded.

It has been said that their observations as to the plaintiff, Major Adam, were not relevant to their vindication of Major-General Scobell, and that privilege does not extend to this portion of the letter. These observations appear to me to be directly relevant. The plaintiff did not mention in his speech in the House of Commons that he was himself interested in the matter, and any one who heard or read his speech would have been left under the impression that he was a perfectly disinterested person who had taken up the case of a brother officer. The vindication by the Army Council of Major-General Scobell would have been incomplete if the true relation of Major Adam to these proceedings had been left out. The two passages especially impugned were, first, the statement that the plaintiff was one of the officers who had been removed from the regiment, and, second, the following sentences: "Further, as showing the absence of hostile bias, the Army Council note that in the case of Major Adam, who in 1906 was called upon to retire from the Service in consequence of adverse reports which were duly communicated to him, you intervened on his behalf and urged the Council to give him another chance in an extra regimental appointment. In the result it was decided to give Major Adam another chance."

So far from being alien to the investigation of the charge made by the plaintiff against Major-General Scobell both these passages appear to me to be directly relevant to it. It was essential to show that Major-General Scobell had been actuated by a friendly feeling towards the plaintiff, and it was as incidental to this that the

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The privilege extended to the whole letter, and there is nothing either in the letter itself or in the surrounding circumstances to supply any evidence of express malice.

I agree with the Court of Appeal in thinking that the judge ought to have ruled that the occasion was privileged.

The learned judge ruled that there was no evidence of malice against the defendant personally, as he had acted for the Army Council and under their orders. The question was really not one of personal malice on the part of the defendant. He was the agent and servant of the Army Council, and must stand or fall with them. If the letter was published on a privileged occasion as regards the Army Council and without malice on their part, their secretary, through whom the communication was made by them, has the benefit of the privilege which attached to the Council itself. If, on the other hand, the occasion had not been privileged, or there was express malice, their secretary would be liable, although he personally had no ill-will towards the plaintiff.

In my opinion this appeal should be dismissed with costs.

EARL LOREBURN. My Lords, Sir Hugh Fraser has put all that could possibly be urged on behalf of the appellant with a fairness which added to the weight of his argument. But he has failed to show that there is any evidence of malice either in the defendant or in the Army Council. The document charged as a libel admittedly contains matter which admits of a defamatory sense, and the defendant's counsel did not dispute that it in fact had a defamatory meaning. Accordingly that issue was not left to the jury. There is no plea of justification, and therefore the one remaining question is that raised by the plea of privilege.

I understand the law to be as follows : It is for the judge alone to rule whether or not there is an occasion of privilege, and the rule on that subject was laid down many years ago in the case of *Toogood v. Spyring*. (1) Subsequent decisions have illustrated that rule. But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that

(1) 1 C. M. & R. 181.

is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion. For a man ought not to be protected if he publishes what is in fact untrue of some one else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact publishes it. All this is for the judge alone, and the question of malice, which is for the jury, cannot arise till the judge has ruled on the whole question of privilege.

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Language has been used in some cases which seems somewhat to confuse the two separate points, namely, whether the defendant has gone beyond the privilege which the occasion creates, and whether the defendant has forfeited the privilege by malice. Excess of privilege in part of a defamatory publication may of course be evidence of malice as to the whole of it, but the two things are different. The one is a matter for the judge, the other is matter for the jury. And observations made by judges in directing juries as to what is evidence of malice are not necessarily applicable when they have to rule as to excess of privilege. But I agree that in ruling upon that subject a judge may well think that a man is justified in inculcating his accuser in order more effectively to exculpate himself, and also may well think that the defendant has not exceeded the privilege when he has expressed himself with some warmth under real provocation, though no one can be justified in using such an occasion beyond the reasonable limits of self-defence.

I will only add that when one part of a libel is held to be protected by privilege and the other part not protected the jury ought to be told that they cannot give damages in respect of the first part at all, unless they are satisfied that it was malicious, which may be proved by the character of the unprotected part or by other evidence.

Applying this view of the law to the present case, I am quite

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sure that the attack made on General Scobell by the appellant in the House of Commons not only permitted but required the Army Council to vindicate the conduct of that officer, and that both that Council and the defendant, who acted by their direction, were in the fullest sense within the privilege recognized by the law when they published to the country at large a defence of General Scobell. I have had more doubt upon the question whether or not all that is contained in the letter which forms the subject of this action was covered by the privilege, and am disposed to take on that point the same view of the facts that appears from his summing-up to have been taken by Darling J.

But in view of the speech of the appellant made in the House of Commons, where he used an absolute privilege to attack another officer who had done him no wrong, but on the contrary had befriended him, I could not possibly approve of the heavy damages awarded by the jury. I shall not dissent from the view of your Lordships.

LORD DUNEDIN. My Lords, the pleadings and evidence in this case are voluminous and the issue of importance to those concerned. Yet, notwithstanding the elaborate and painstaking address of the counsel for the appellant, which absolved your Lordships from sharing the regret he expressed at the absence of his leader, I cannot say that I have any doubt or hesitation in thinking that the judgment of the Court of Appeal was right. The reasons given for that judgment by Lord Wrenbury, then Buckley L.J., are entirely satisfactory to my mind. I only venture to add some remarks of my own, because some of the leading principles of the law of libel and privilege have been freely discussed, and this case will take rank in the future as an authoritative pronouncement on these matters. I do not propose to enter in detail into the facts of the case, as that has already been done by the Lord Chancellor, and I shall only mention those which are necessary to make intelligible the conclusions at which I have arrived.

The primary fact in the case is the speech made by the plaintiff in the House of Commons on June 27, 1910, and in particular the paragraph he read from a typewritten sheet in order, as he said, "that there may be no mistake and that I may not be led away by rhetorical

exaggeration." I need not quote it, as that has already been done. To my mind these words could, to the audience which heard them or to the ordinary man who read them in "Hansard" or in a newspaper report, only convey one meaning, namely, that General Scobell had inserted, with deliberate purpose, false statements of fact in a report or reports as to officers under his command and had thereby deceived those in authority, with the consequence that a certain regiment had been unjustly treated. It is true that on a critical analysis of the words "rendered" and "containing" it is possible to make the sentence fit with the idea that the false statements in the report were not of General Scobell's own fabrication, but were merely forwarded by him. But neither is that the natural meaning of the words nor is it what the plaintiff intended should be understood by them, for he admits in cross-examination that he phrased the passage as he did in order to compel General Scobell to take up the matter under the King's Regulations; and the only part of the King's Regulations which imposes such a duty is the paragraph which compels an officer whose "character or conduct as an officer or a gentleman has been impugned" to ask for an inquiry. He seeks to excuse himself by saying that the inquiry, if held, would have shown that the real culprit as to the false statements was Colonel Graham and not General Scobell.

That the words used contained an imputation on General Scobell's honour no one can doubt. Under the King's Regulations, already referred to, the General could not deal with the matter himself, but was bound to do what he did—bring the matter before the Army Council and ask them to inquire as to the truth of the accusation made against him.

On this it appears to me clear that there arose on the part of the Army Council a duty, not only moral, but actually legal under military law, to make the inquiry demanded. In what particular way or form the inquiry should be held was, I think, a matter for them and for no one else to determine. The Army Council proceeded to institute an inquiry, but before doing so they called on the plaintiff to furnish them with any statement he might wish to make "in amplification or substantiation" of the charge that he had made. To this the plaintiff replied that as the inquiry was to be conducted by themselves, and as the Army Council "had forfeited the

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The Army Council accordingly held the inquiry within, so to speak, their own walls. They came to the conclusion that the charge made was unfounded. They wrote a letter to General Scobell telling him so, and they published that letter.

Now, if the matter is thus baldly stated, can it for a moment be supposed that this publication is not a performance of a moral if not even of a legal duty and as such privileged? Let us look at the situation. General Scobell is grossly attacked in a speech in the House of Commons—a speech which in that place, from motives of high public policy, is protected by absolute privilege. Under the King's Regulations he may not take up the matter himself and defend himself in the public Press. He is bound to refer the matter to the Army Council and await their verdict. The verdict is in his favour. What would that avail him unless there was a right in the Army Council to publish the result at which they had arrived? If it were not so, then the absolute privilege of the House of Commons, intended to safeguard the liberty of discussion, would be really turned into an abominable instrument of oppression.

Two replies are, however, made to this, which I shall take in their order. It is said, first, that the publication here was to an unduly wide public, that there was no duty to publish to every one, but only to those who were likely to have become aware of the accusation, and that to make such a wide publication as was here made was in accordance with no duty or right. My Lords, I think that a man who makes a statement on the floor of the House of Commons makes it to the world. True it never reaches every person in the world. In some cases, if the orator is unknown to fame and the statement intrinsically unexciting, it may not reach very many. But no one knows whom it may reach, and it was only, I think, plain justice to General Scobell that the ambit of the contradiction should be spread so wide as if possible to meet the false accusation wherever it went. Do what you will, the stern chase after a lie that has got the start is apt to be a long one. As a matter of fact the Army Council instructed their secretary, the defendant, to send the communication to the channels to which they ordinarily send all official communications. The list is a long one and the ambit of

influence is wide ; but in my judgment the list was not longer or the ambit wider than was demanded by justice to General Scobell.

The second reply raises what is, I think, the real and only point in the case. I have hitherto dealt with the communication as if it was a bald statement of the unfoundedness of the charge against General Scobell. But the letter was a long one, and it is urged that, in so far as it went beyond the mere statement of General Scobell's innocence and proceeds to say things defamatory of the plaintiff, it was not in the exercise of any duty or right, and that for these statements there is no privilege.

My Lords, in discussing this question a controversy was raised at the Bar as to what is the accurate way of expressing the legal doctrine. It has to be kept in view that the learned counsel for the defendant did not put forward the contention that the language used was not defamatory of the plaintiff. At first sight this is rather startling in view of the expressions used and in the light of the facts of the case. I should have thought that what may be called the moral effect of this attitude on the jury would be rather disastrous. I do not doubt that the words used—upon which I shall comment shortly—were such that the judge could not, if asked, have removed them entirely from the cognizance of the jury by ruling that they were incapable of a defamatory interpretation. But they were equally capable of an innocent interpretation and an interpretation which squared with the underlying facts of the case. Now it is one thing, so far as moral effect is concerned, to say “I meant what I wrote innocently, and I contend that is the true meaning of the words used”—even although it may eventually be decided against you that the true interpretation is otherwise, and it is another thing to say from the first “I cannot deny that the words I used were defamatory.” That words intended innocently may yet be held to be defamatory is quite certain. No better illustration can be given than the case of *Hulton & Co. v. Jones*. (1) In that case, in which there was difference of opinion between the learned judges, and where certainly the high-water mark of the doctrine was reached, but which, as a decision of your Lordships' House, is certainly the law, no one for a moment supposed that the writer of the article was using words which he thought were defamatory of the plaintiff, Artemus Jones.

(1) [1910] A. C. 20.

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 1917 were held to be defamatory because they could be read by the
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 v. the admission thus made is startling, I have come to the conclusion
 WARD. that it makes no difference to the matter in hand. In other words,
 Lord Dunedin. the admission of the defendant through his counsel that the words
 used were in themselves defamatory puts the case in precisely the
 same position as if the judge had left the true meaning of the words
 to the jury—as I think he would, if there had been no admission,
 have been bound to do—and the jury had found that they were
 defamatory.

What now is the situation? You have a communication issued on a privileged occasion; and *in gremio* of that communication are used words which are in themselves defamatory. What test is to be applied? On the one hand, it is said that, the occasion being privileged, the whole document is privileged, but that if in the document you find parts which are not really necessary to the fulfilment of the particular duty or right which is the foundation of the privilege on the occasion, then these parts may be used as evidence of express malice. In other words, it stands thus: Malice, which is of the essence of libel, is presumed from defamatory words. Privilege destroys that presumption. But the place of the implied malice which is gone may be taken by express malice which may be proved. It may be proved either extrinsically or intrinsically of the document, and such words in the document are apt as evidence. Thus Buckley L.J. states as to the whole matter: "There are two questions. The first whether the occasion was a privileged occasion, and if it was, then, secondly, whether there was any evidence of malice."

On the other hand, it is said that it is not necessarily a question of malice at all; that privilege applies to what is written and published in response to a duty or right; and that if anything is found in the thing published which is not reasonably appropriate to that duty or right, then privilege cannot extend to that. My Lords, I think it will be found that in most cases these are merely two ways of expressing the same point. But there is this to be said in favour of the former method, that it is a formula which as a test will fit most if not all cases, whereas the second would necessarily break

down in a good many. For it could always be said with apparent force that it never can be necessary to incorporate in a statement made in response to a duty or right any defamatory statement which is not logically necessary to fulfil that duty or right. Thus cases like *Spill v. Maule* (1) ("most disgraceful and dishonest") and *Laughton v. Bishop of Sodor and Man* (2) ("bring false witness against a neighbour") would, if tried by this latter test alone, be held to be wrongly decided, though as a matter of fact I do not think it is suggested that they were anything but right, and in my opinion they were right, as, indeed, becomes evident if they are tried by the first test.

My Lords, I have not said that the first test is universally applicable and for this reason: If the defamatory statement is quite unconnected with and irrelevant to the main statement which is ex hypothesi privileged, then I think it is more accurate to say that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it, and under it will also range all the cases where the express malice is arguable from the too great severity or redundancy of the expressions used in the privileged document itself. In short, I adopt the law as laid down by Lord Esher M.R. in the case of *Nevill v. Fine Arts and General Insurance Co.* (3) The learned judge there says: "... in this case there was no evidence of such malice. That being so, the defendants have proved that the occasion was privileged, and there was no evidence of malice in the mind of anybody to rebut that privilege, and the defence stands good. But then the jury were asked to find, and have found, that the privilege was exceeded. There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the

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(1) L. R. 4 Ex. 232.

(2) L. R. 4 P. C. 495.

(3) [1895] 2 Q. B. 156, 170.

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privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion." (A good illustration of this will be found in the case of *Warren v. Warren*. (1)) "But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice."

This question is of necessity closely connected with the question of the respective functions of the judge and of the jury. I do not think it necessary to analyse the very numerous decided cases which were cited to us in the course of the argument. I have studied them all, and what I am about to say is, I believe, the true doctrine to be drawn from them. But it may be as well to make this remark, that certainly some confusion has resulted from the use of the convenient phrases "privileged statement" and "extension of the privilege." Strictly speaking, it is the occasion on which a statement is made that is privileged, and the phrase that such and such a statement is privileged would be more accurately, though perhaps, more clumsily, expressed by saying that, the statement having been made on a privileged occasion, malice cannot be implied from defamatory expressions therein, but must be proved as a real fact. The malice to be proved must be real malice, and is generally called "express malice" to distinguish it from the malice which is implied from the defamatory words themselves. The duty of deciding whether the occasion is privileged is cast upon the judge alone, and the jury has no hand in it. The criterion as to whether the occasion is privileged or not is most tersely stated in the well-known passages of Parke B.'s judgment in *Toogood v. Spyring* (2): ". . . fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned" and again: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." And the judge must put the question suggested by that definition to himself.

(1) 1 C. M. & R. 250.

(2) 1 C. M. & R. 181, 193.

If the statement is, so to speak, divisible into parts it may be that the judge may come to the conclusion that certain parts are not truly referable to the particular right or duty which in the case in hand is the foundation of the privilege. If so, he will so find—that is to say, he will find that paragraph 1 is referable and appropriate to a privileged occasion, paragraph 2 is not so. Then if paragraph 2 contains defamatory words, malice will be implied as to them. If, however, he finds that both paragraphs are referable and appropriate to the privileged occasion, then, as it is more commonly but less accurately expressed, he finds that the privilege extends to the whole statement. In that case the next question he has to put to himself is whether the defamatory words complained of are capable of affording, from their own nature alone, evidence of express malice. If he holds them incapable, and there is no other evidence extrinsic of the document, then the plaintiff's case is gone and the jury has not to be called upon at all. But if the judge thinks that the words are so capable, then he must leave it to the jury to say whether from the words alone, or in conjunction with extrinsic evidence, if there be any such, express malice has been proved. It might thus occur, though the case will probably be rare, that, as above imagined, defamatory words in the non-privileged paragraph 2 could afford evidence of express malice in connection with the expressions used in the privileged paragraph 1.

I need scarcely add, but it makes the statement complete to do so, that, if there is controversy as to whether the words used are defamatory or not, it is for the judge to determine whether they are capable of a defamatory meaning, and, that being resolved in the affirmative, it is for the jury to find whether they are actually defamatory or not.

My Lords, I now return to the facts of this case, and here I am of opinion, concurring with the Lord Chancellor, that the present case is a case where the defamatory statement was part and parcel of the privileged statement and relevant to it. A grave charge had been made against General Scobell, but it had been made in the guise of calling attention to the grievance of brother officers—particularly one officer—of the plaintiff. It was relevant to show that in so doing the plaintiff was really airing his own grievance, “*Mutato nomine de te Fabula narratur*,” and I think that the Army Council

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H. L. (E.) were entitled to say so. In doing so, they used the expression relative to the plaintiff of "removed from the regiment," an expression which in the innocent sense was true and not defamatory, for the plaintiff had been removed from his regiment by being sent to Headquarters and subsequently put on half-pay. It is true that it must be taken as settled that the expression must be regarded in a defamatory sense. But, though that is so, it is well settled that express malice cannot be held as proved from the mere fact of the expression being defamatory: *Spill v. Maule* (1) and *Laughton v. Bishop of Sodor and Man*. (2) And, further, when considering whether the actual expression used can be held as evidence of express malice no nice scales should be used. I would particularly cite the words of the judgment of the Privy Council of the latter case (3): "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications." This disposes of the first passage pointed out as defamatory.

Then comes the only other passage relied on where the letter says that the plaintiff had been called upon to retire "in consequence of adverse reports which were duly communicated to him." But this is only said as a preface to pointing out that General Scobell, whom he had accused of deliberately making false statements, in virtue of which injustice had been done to regimental officers of whom he was one, had, so far from being actuated by hostile bias against him, been the very man to intercede at Headquarters for the plaintiff, with the result of persuading the authorities to give him another appointment. Indeed, when we come to the language, it is, in my opinion, strictly accurate, and the admission as to defamatory language in general terms cannot be held to apply to it. For he was called on to retire, as witness the War Office letter of December 1, 1906. The reason given for the request was a report by General

(1) L. R. 4 Ex. 232.

(2) L. R. 4 P. C. 495.

(3) L. R. 4 P. C. 508.

French. And that that report was communicated to the plaintiff, notwithstanding the plaintiff's denial in the box, is, I think, proved (a) by the evidence of General French; (b) by the expression used in the plaintiff's letter of March 25, 1911, in which he speaks of "the communication of the General Officer Commanding-in-Chief at Aldershot *which I held in my hand*, and requested him to apply for the (Colonel Graham's) report to be sent to me to read"; and (c) by the fact that in his letter of December 9, 1906, referring to the War Office letter of December 1, he begs for reconsideration of the decision announced in that letter and makes no complaint of the non-communication of the report therein mentioned. But even if this were not so the same argument would prevail, as I have already stated in regard to the expression "removed from the regiment."

I am accordingly of opinion that privilege attaches to the statement here complained of; that no malice can be implied; and that to succeed the plaintiff must prove express malice. As to express malice, all the learned judges, including the trial judge, are agreed that there is absolutely no evidence, either extrinsic or intrinsic, of malice on the part of the defendant, Sir Edward Ward. For my own part I fail to see how, if it was once shown that Sir Edward Ward was merely obeying orders when he signed the statement drawn up by the Army Council and sent it for publication, and was relying, as he was entitled to do, on the privilege which attached to the action of his superior and principal, the Army Council, any evidence as to malice on his part could be relevant. It is not necessary, however, to decide that question. It is only necessary to add that there is not a shred of evidence of malice on the part of the Army Council. Their malice, in my view, would be relevant. But as it does not exist it is unnecessary to consider that question either.

My Lords, there are two other matters which, although not affecting the judgment to be pronounced, ought, in my opinion, to be mentioned. The learned judge who tried the cause took what I believe is a very unusual course in two particulars. He disposed of the question of malice while the question of privilege was still unsettled. I do not know if this can be said to be wrong, but at least it is highly inconvenient. The second matter is more serious. In order to dispose of the question of privilege he put to the jury

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certain questions, of which three were as follows : Was the publication—that is, the document published—of a public nature ? Was the subject-matter of that publication by defendant matter about which it was proper for the public to know ? Was the matter contained in the letter proper for the public to know ? To all of which the jury returned a negative answer, and upon that the learned judge said : “ Upon these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion.” It is clear that so far as the questions go they assume that the foundation of the duty or right which was invoked to support the privilege was that the matter discussed was one of public importance : whereas the true foundation in this case was the duty of the Army Council to make publicly known their vindication of General Scobell’s honour. But apart from that, and in view of what I have already stated as to the provinces of judge and jury, I entirely agree with the learned judges of the Court of Appeal, who held that these questions were for the judge and not for the jury. If there is some fact left in controversy which must necessarily be determined one way or the other, to allow the judge to view the complete situation and thus enable him to decide whether the occasion was privileged or not, it would be right for the judge to ask the jury to determine that fact. But to put to them questions such as these and then on the findings to find privilege or the reverse is simply to ask the jury to decide for him the question which it is his duty, and not theirs, to determine.

LORD ATKINSON. My Lords, I concur. The facts have been fully stated already, and I desire to refer to them only so far as is necessary to make what I am about to say intelligible. During the progress of Sir Hugh Fraser’s able and candid argument I pressed him several times to indicate what were the precise words in the alleged libel which were reasonably susceptible of a defamatory meaning. In the result his replies amounted as I understood, to this : that the word “ removed ” and the words “ which were duly communicated to him,” occurring after the word “ reports ” contained the sting of the libel. He admitted that if after the word “ removed ” the words “ by being put on half-pay ” had been inserted and the words “ which were duly communicated to him ” had been deleted there

would not have been anything defamatory of the plaintiff in it. Owing to the course taken at the trial, the question of whether the alleged libel as it stands is reasonably capable of a defamatory meaning is not open for the consideration of this House. Neither is it open to it to set aside the verdict on the ground that the damages are excessive. But when it is admitted by the appellant's counsel that the trifling alterations in the alleged libel which I have indicated would have made it innocuous, I think there would be great difficulty in holding that, having regard to all the facts of the case, there is any reasonable proportion between the wrong alleged to have been done, and the damages awarded in respect of it. The truth is, I think, that at the trial the investigation was allowed to wander off into all sorts of irrelevant matters. The case proceeded, and the damages were awarded, as if the cause of action was not the alleged libel, but the unjust treatment the plaintiff was alleged to have received at the hands of the military authorities years before the libel was published. The learned judge who tried the case might possibly have ruled, on the question of law, whether or not the occasion on which the alleged libel was published was a privileged occasion but for the answers he had received from the jury in reply to questions as to certain things the existence of which went to make the occasion of the publication privileged. He did not leave the question of privilege or no privilege to the jury, but he did leave to the jury the question as to the presence or absence of the elements which go to create privilege. For instance, the question "Was the subject-matter of the publication by the defendant matter about which it was proper for the public to know?" And the question "Was the matter contained in the letter proper for the public to know?" It is to be regretted that the remarks of Willes J. in *Henwood v. Harrison* (1) were not brought to Darling J.'s notice. Willes J., a most learned, laborious, and accurate judge, after stating that since the declaratory Act of 1792 (32 Geo. 3, c. 60) the jury are the proper tribunal in civil as in criminal cases to decide the question of libel or no libel, said: "But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made bona fide without malice are libellous." He then proceeds: "It would be abolishing the law of privileged discussion, and deserting the duty

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(1) L. R. 7 C. P. 606, 628.

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of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the Church, the Army, the Navy, Parliament itself, to be of no national or general importance, or the liberty of the Press to be of less consequence than the feelings of a thin-skinned disputant." It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication—a phrase often used loosely to describe a privileged occasion, and vice versa—is a communication made upon an occasion which rebuts the *prima facie* presumption of malice arising from a false and defamatory statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact: per Parke B., *Wright v. Woodgate*. (1) Nor that the question of whether the occasion is a privileged occasion or not is, if the facts be not in dispute, or if in dispute have been found by the jury, a question of law to be decided by the judge at the trial. Nor yet that a person making a communication on a privileged occasion has not, in the first instance and as a condition of immunity, to prove affirmatively that he honestly believed the statement made to be true, his *bona fides* being in such a case always presumed: *Jenouire v. Delmege* (2); *Clark v. Molyneux*. (3) All these matters were not questioned. They could not be questioned successfully. Nor was it suggested that, while on the question of malice the *bona fide* belief of the defendant that he was under a moral or social duty to make the communication is relevant and important, the existence, in fact, of this duty or interest, not merely the defendant's belief in its existence, is the thing which is relevant to the question whether the occasion was or was not privileged: per Lindley L.J., *Stuart v. Bell*. (4) It was, however, strenuously contended on the part of the appellant, as I understood, that the language used in a communication made on a privileged occasion must, if it is to be protected,

(1) 2 C. M. & R. 573, 577.

(2) [1891] A. C. 73, 79.

(3) (1877) 3 Q. B. D. 237, 249.

(4) [1891] 2 Q. B. 341, 349.

merely be such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded. It has long been established by unquestioned and unquestionable authority, I think, that this is not the law. This point is of such importance that one may be excused for referring at length to three authorities to show what the law on the subject really is, and in what light the language used in privileged communications is in a Court of law to be regarded. In *Spill v. Maule* (1) the libel sued upon was contained in a letter written by the defendant, a creditor of a firm, who had been engaged by the firm to wind up its affairs, to another creditor of the same firm. The plaintiff had had disputes with his partner before and during the winding up, and he, suspecting that his partner was drawing out the money of the firm on his own account, took from the cash-box of the firm a parcel of bills, directing the clerk to take an account of them and to tell his partner to debit his, the plaintiff's, account with them. The defendant dealt with this transaction in the above-mentioned letter, and stated that the plaintiff's conduct in reference to it "has been *most disgraceful and dishonest*, and the result has been to diminish materially the available assets of the estate." The plaintiff at the trial proved these facts. They constituted his case. Thereupon the presiding judge, Martin B., directed a verdict for the defendant. A bill of exceptions was tendered to this ruling, on the ground that though the communication was privileged, yet the violent and abusive terms used in the letter were evidence of actual malice. The judgment of the Exchequer Chamber was delivered by Cockburn C.J., Keating, Lush, Hannen, Hayes, and Brett JJ. concurring. The case is therefore one of high authority. After stating the facts the Chief Justice said (2): "The question then arises, whether the language is too strong for the occasion; the terms applied to the plaintiff's conduct being 'most disgraceful and dishonest.' Now, the communication being privileged, the presumption is in favour of the absence of malice in the defendant, and in order to rebut this presumption, the plaintiff must show actual malice, and he may no doubt show this by reference to the terms of the libel as being utterly beyond and disproportionate to the facts." He then proceeds

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(1) L. R. 4 Ex. 232.

(2) L. R. 4 Ex. 236.

H. L. (E.) to refer to the plaintiff's act in taking away the bills, and says :
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“This act was capable of a twofold construction ; it might have taken place under such circumstances that the plaintiff could not properly be exposed to any moral censure, as, for instance, if he only intended to keep the assets in security for the benefit of creditors : or the circumstances might have been such that in taking the bills he acted dishonestly and disgracefully. Now, the presumption of the law being in favour of the absence of malice in the defendant, and the only evidence of malice being his description of acts done by the plaintiff, which were capable of a twofold construction, that presumption of innocence which attaches to the writer must also, while his act is capable of a double aspect, still attend him. . . . We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully ; all we have to examine is whether the defendant stated no more than what he believed, and what he might reasonably believe ; if he stated no more than this, he is not liable, and, unless proof to the contrary is produced, we must take it that he did state no more.” The direction of Martin B. was accordingly upheld. I cannot find that the authority of this case has ever been questioned. It was cited with approval in the case of *Laughton v. Bishop of Sodor and Man* (1), to which I am about to refer. It will be observed that the Chief Justice says that the terms of the libel which are evidence of malice are not merely such as are beyond the necessities of the occasion, but such as are utterly beyond and disproportionate to the facts.

The case of *Laughton v. Bishop of Sodor and Man* (1) has, I think, a direct bearing upon the present case. The appellant Laughton, a barrister, having been retained to oppose at the bar of the House of Keys a bill in which the respondent was interested, in the course of his remarks very severely criticized the respondent and his mode of discharging his duties. The Bishop, in an address which he read to his clergy assembled in convocation, and subsequently had printed and published in a local newspaper, the *Manx Sun*, did not confine his observations merely to a defence of himself against the charges made against him. He, in addition, violently assailed and denounced his critic, Laughton. He accused him

(p. 498) of making slanderous statements and uncharitable imputations under the apparent sanction of well-informed persons ; of making statements with an entire disregard of truth ; of being a wicked man ; of making calumnious assertions ; and of being guilty of the sin of bearing false witness against his neighbour. The Deemster before whom the case was tried ruled that the occasion on which the libel was published was a privileged occasion, but left to the jury the question of actual malice, of which the excessive nature of the Bishop's language he apparently regarded as evidence. The jury found a verdict for the plaintiff for 400*l*. The Appeal Court of the Isle of Man set aside this verdict, on the ground that there was in the case no such evidence of express malice as justified the Deemster in leaving the question of malice to the jury. This decision was upheld by the Privy Council, on the ground that, having regard to the circumstances and the nature of the attack upon him, the Bishop might have honestly believed that everything he said was true and proper for his own vindication, although in fact some of his expressions exceeded what was necessary for it, and that the language of his charge was more consistent with such an honest belief, and with the purpose of self-vindication, than of injuring the plaintiff, but that had the Bishop referred to the conduct of the plaintiff on any other occasion than that of his addressing the House of Keys, or made any general attack upon his private or professional character, the case would have been different. In delivering the judgment of the Board Sir Robert Collier said (1) : "Some expressions here used" (i.e., used by the defendant in his defence) "undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications."

That decision has been approved of many times. It was relied upon by Lord Macnaghten when delivering judgment in the case of *Jenouire v. Delmege*. (2) Its soundness has not, I think, ever been questioned.

(1) L. R. 4 P. C. 508.

(2) [1891] A. C. 73, 76.

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In *Nevill v. Fine Arts and General Insurance Co.* (1) the appellant Lord William Nevill, in the year 1892 became agent to the respondents, and conducted the agency at his own office, 27, Charles Street, St. James's. The appellant, after some months had passed, desired better terms, and a correspondence passed on this subject. In December, 1893, the secretary of the respondents wrote to the appellant informing him that the board of directors of the respondent company had decided to terminate the agreement with him. An alteration of terms was made, and the appellant continued to act as agent for the respondents. In answer to a question as to the appellant's intentions his solicitor wrote on March 13, 1894, that his client wished to sever all connection with the company, owing to the insufficiency of his terms. On March 15, 1894, the secretary of the respondents sent to certain persons who had transacted business with them through the appellant's office a circular stating that the agency of Lord William Nevill at 27, Charles Street had been closed by the directors, and requesting them to direct all communications to the West End secretary at 19, St. James' Street. The innuendo put upon these words was that they meant that the plaintiff had been dismissed by the defendants from his employment as their agent for some reason discreditable to him. Pollock B. tried the case. He stated that he ruled that the occasion which required the writing of some such letter was privileged, that it was contended for the plaintiff that, although the occasion was privileged, that part of the letter which stated falsely that the agency had been *closed* by the directors was not called for by the *requirements of the occasion*, and was therefore in excess of the privilege. He accordingly left to the jury the question whether the defendants, in making the statement that the plaintiff's agency *was closed* by the directors, had exceeded the privileged occasion. The jury, having first found that it was untrue that the directors had closed the agency, answered this question in the affirmative, and found a verdict in favour of the plaintiff for 400*l.* damages, for which, after consideration, Pollock B. entered judgment. There was no finding of actual malice. On appeal to the Court of Appeal it was decided, the occasion being privileged, that in the absence of a finding of actual malice the defence of privilege was not rebutted,

(1) [1895] 2 Q. B. 156, 159, 160, 171; [1897] A. C. 68, 75.

and that, it appearing on the facts of the case that there was no evidence of actual malice in the publication of the statement complained of, the action was not maintainable. Lord Esher in his judgment deals with the question of this excess of privilege in the words which have been already quoted by my noble friend who has preceded me. Lopes L.J. concurred, and in his judgment relied upon the passage I have already quoted from the judgment in *Laughton v. Bishop of Sodor and Man*. (1) On appeal to the House of Lords all the noble Lords who took part in the decision were of opinion that the statement that the agency had been closed was true in fact in the only sense relevant to the context in which it was found, and that there was no evidence of malice. They upheld the judgment of the Court of Appeal. And Lord Halsbury, referring to this statement, says: "But suppose it was not true, suppose it was not accurate in the sense in which people would have understood it, . . . suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though in the mind of some other person it should be inaccurate in form, it seems to me that it would be impossible to contend that that would be evidence of malice."

These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so. It was next urged on behalf of the appellant that the Army Council should have confined themselves to stating that the charges made against Major-General Scobell were on investigation found to be unfounded, and that he had been fully exonerated, and, therefore, that all the references contained in the libel to the appellant himself, his conduct, career, or the treatment he received, were foreign and irrelevant subjects, not pertinent to the discharge of the duty, or to the protection of the interest which

(1) L. R. 4 P. C. 495, 508.

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form the basis of the privilege claimed ; but were separable from the relevant parts of the libel, and, to use the words of Lord Esher, were outside the privileged occasion and had nothing to do with it ; and that since, to afford a defence, the whole communication should be within the protection of the privileged occasion, if part only were so, the entire communication ceased to be a privileged communication or to be protected. Some question was raised as to whether the presiding judge was the person to decide whether any foreign and irrelevant matter had been introduced into the libel, and whether it was separable. I think it must be the judge who is to do so. He it is who must decide whether the occasion is privileged or not, and if that be so, he must necessarily decide in respect of what portion of the libel the occasion would be privileged if it stood by itself. A more difficult question, however, remains upon which the authorities cited give little, if any, assistance. It is this : What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel ? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice. In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think it is, in law, the true result. Owing, however, to the view I take of the contents of the libel, this question is, to my mind, a purely academic one. For reasons I shall presently adduce I do not think any foreign or irrelevant matter has been introduced into the libel ; but as the point has been raised and fully argued, and is itself of importance, it is, I think, desirable to decide it. I have accordingly expressed my opinion upon it. Some argument was directed to the defendant's precise position in relation to this libel, his rights, duties, and privileges, his feelings towards the appellant, and his express or implied malice. I think his position is plain. He was the mere agent of the Army Council, bound to obey their orders or resign his post—the mere instrument through whose hands the libel passed for publication. His own personal feelings or privileges

are, I think, not involved in the case at all. He had nothing whatever to do with the composition of the libel, or the approval of its contents. In the mere routine of the work of the office he signed his name to it and passed it on for publication in the way and over the area usual in such cases. To suppose that it was his duty to attempt to dissuade his principals from publishing the libel, to criticize their language, or, save at their request, to alter it is, in my view, quite absurd. It is no doubt true that one cannot defend himself for publishing a libel simply by saying that another person whom he was bound to obey ordered him to publish it; but it is equally true that when an agent, in obedience to the command of his principal, merely does the mechanical act of publishing the libel handed to him complete the privilege of the principal becomes, as it were, his privilege, and if the principal has caused the communication to be made to protect the interest or discharge the duty which would have made the occasion privileged if he had published the libel with his own hand, the agent can equally rely on the publication having been made on a privileged occasion. For this purpose he stands, in my view, in the shoes of his principal, has the same rights and the same liabilities. I think this follows from the reasoning of the judgments in *London Association for the Protection of Trade v. Greenlands, Ltd.* (1). The appellant was not ashamed to admit that he published this vile slander of his friend and benefactor, General Scobell, believing that the charges it contained were untrue. He seeks to justify that most discreditable act by saying that he did it to force General Scobell to demand an inquiry, in which he (Scobell) would be exculpated and the real culprit be discovered. But the Army Council were not told of this unworthy stratagem. They, in their ignorance, could hardly have supposed that the appellant would have stooped to it, and have charged Major-General Scobell with the shameful act he did charge him with unless he believed that the General was really guilty. It was therefore quite natural that, in order to disabuse the appellant's mind of the notion that either Scobell or the Army Council had any ill-will towards him or any motive for doing him a wrong, they should recall the acts of kindness done to him by both. The appellant, in the House of Commons, posed, no doubt, as a member who was bringing forward the

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grievances of Captain Wilson, not of himself. That was, however, a mere pretence. The War Office knew it was a pretence. It was too transparent to deceive any one who knew the facts. But the public did not know the facts. It was clearly, therefore, justifiable, if not desirable, that the public should be informed of them, and shown that the appellant in traducing his own superior officer was not the disinterested defender of Captain Wilson, but was grinding his own axe and, under an alias, as it were, airing his own grievances, making his own complaint. It was evidently for the purpose of informing the public on this point that the statement was introduced into the alleged libel to the effect that the appellant himself was one of the officers removed from the 5th Lancers in consequence of the alleged false reports. That was obviously pertinent. So was the statement that the appellant had been called upon to substantiate his charges and had failed to do so. Nothing could tend more to show the public that the charges were untrue and that the exculpation of General Scobell was right. Everything in the libel was, I think, pertinent and relevant to the central facts that the appellant had made these charges against General Scobell, had failed to substantiate them, and that they had been investigated by the Army Council and found to be untrue. The appellant was naturally dissatisfied with the mode of investigation adopted. It manifestly did not suit his book. It frustrated his plan. It afforded him no opportunity, by cross-examination of the man he had made a cockshy of for his calumnies, of discovering the supposed wrongdoer. He would have preferred apparently a Court of inquiry. A Court of inquiry is a Court to collect evidence, not, like a court-martial, to pass judgment. The accused apparently did not ask for a Court of inquiry. The Army Council may have considered they had sufficient evidence before them to enable them to decide, and did not need a Court of inquiry to collect further evidence. It can hardly be contended that the traducer has the right to select the tribunal before which the traduced is to defend himself, and that the traducer is aggrieved if that right is denied to him. His complaint on that head may be disregarded. The next point urged on behalf of the appellant was that the publication of the libel was unnecessarily wide; that it extended over too vast an area; that neither the Army Council nor the defendant had any interest or duty to

publish it to people inhabiting the remote parts of the Empire which the libel might reach ; that these latter had no corresponding interest or duty in receiving the communication ; and that either the occasion of the publication was therefore not a privileged occasion, or that this wide publication was evidence of actual malice. I cannot agree. The area was the usual area over which such matters are published by the Army Council. It must be remembered that every subject of the Crown, whatever portion of our far-flung Empire he may inhabit, has, and must have, an interest in the British Army, its courage, the confidence of its men in their officers, its discipline and efficiency, for this amongst other reasons, that he never can be sure whether the day may not come when the lives of himself and his family, the safety of his property or his liberty may not depend on its success in the field against the Empire's enemies, or the efficiency of its aid of the civil power in suppressing tumult and crime in the locality where he lives. The efficiency and discipline of troops must depend on the character, training, and acquirements of the officers who lead them. It would be a disgrace and injury to the Service if a man, publicly accused of the shameful breach of duty of which General Scobell was accused, was allowed to continue in command of a brigade in the Army unless and until he had been cleared of the accusation made against him. Every subject, therefore, who had an interest in the Army had an interest in being by a public communication informed of General Scobell's acquittal. But I go further. I think it may be laid down as a general proposition that where a man, through the medium of Hansard's reports of the proceedings in Parliament, publishes to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office he selects the world as his audience, and that it is the duty of the heads of the service to which the servant belongs, if on investigation they find the imputation against him groundless, to publish his vindication to the same audience to which his traducer has addressed himself. In my view the Army Council would have failed in their duty to General Scobell personally, and to the great Service which they in a certain sense govern and control, if they had not given the widest circulation to the announcement of the General's vindication. I think, therefore, the appellant's contention on this point

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 ADAM privileged occasion, and that there was no evidence of express malice
 v. either against the defendant or against the Army Council. I think
 WARD. the appeal fails on every point, that the decision of the Court of
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 Lord Atkinson. Appeal was right and should be upheld, and the appeal be dismissed  
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 with costs here and below. I wish to point out that though the
 combined confidential report was not, according to the appellant,
 shown to him before it was sent in, as it should have been, and he
 was thus deprived of an opportunity of defending himself, still,
 if it did not charge him with any specific act or default which he
 could have disproved, but, as far as we know, like Lord French's
 report, only expressed the opinion of his superiors as to his ineffi-
 ciency as a leader of cavalry in the field, there was really nothing
 he could defend himself against. That the report was of this
 character is strongly suggested by the fact that, though he did see
 it on December 6, 1906, no protest whatever against it is made by
 him in his letter of December 9, written three days afterwards.
 That is what one would have expected if the report merely expressed
 the opinion of his superiors on his inefficiency. It would have been
 useless to protest against their judgment of his skill as a leader
 of cavalry ; but it is certainly not what one would have expected
 if the report accused him of any act or omission which he could
 explain or disprove. During the succeeding four years he in his
 letters requests that the Army Council should reconsider their
 decision as to his retirement, and as to his being placed on half-pay,
 but he never said all this time that the reports against him accused
 him of any such act or omission as he could disprove or explain.
 I share the regret of my colleagues that we have not had these
 reports before us, but I can well understand that the War Office
 were unwilling to make a precedent by their production.

LORD SHAW OF DUNFERMLINE. My Lords, I concur.

I should have been well content to adopt, as I respectfully do,
 the judgment of Lord Wrenbury in the Court of Appeal. But the
 arguments submitted at the Bar by the learned counsel for the
 appellant with such care and fulness have convinced me that the
 course of the procedure in this case was such as to cause both

embarrassment and mischance ; and I am glad, accordingly, that your Lordships have thought that the occasion demanded some fresh enunciation of the principles of the law of libel, which principles do not appear to have been followed in the trial of the action.

In view of the judgments which have preceded my own, I do not require to allude in great detail to the facts.

In the House of Commons on June 27, 1910, the appellant made the following statement : “ That Major-General H. J. Scobell, 5th Royal Irish Lancers, did render to superior authority a confidential report or confidential reports on an officer or officers under his command, which report or reports contained wilful and deliberate misstatements of fact, thereby deceiving those in authority to whom the report or reports were rendered, and causing injustice to be done to one of the regiments under his command.”

He explained that he was making this charge deliberately, and read it from type. He added : “ Major-General Scobell is on his way home at the present moment from South Africa ; he arrives in England at the end of this week, and I hope, when he sees the report of this in the paper, as I intend he shall do, he will appreciate the meaning of the words, ‘ wilful and deliberate misstatements of facts.’ I have tried to make it clear, and I hope he will turn up that paragraph in the King’s Regulations which compels an officer in a case like this to refer the matter to his superior authority, the superior authority in this case being the Army Council. I hope sincerely that the Army Council will see that justice is done to Captain Wilson, and that penalties are meted out to those officers who deserve it.”

The meaning of this was only too plain. It was a charge made against Major-General Scobell of a gravely injurious and, unless true, of a deeply calumnious character. The charge was not made against him recklessly, but deliberately ; and it was made under circumstances than which none can be more public or command wider attention throughout the Empire, namely, in the House of Commons. It was made under the shelter of the absolute privilege which covers proceedings in Parliament, and it was directed against a man whose mouth was closed by the King’s Regulations applicable to the Army. It was acutely pointed at his honour by the reference to that regulation which compels an officer to refer the matter to the

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Army Council. So serious was the charge against Major-General Scobell's character and conduct as an officer and a gentleman that he became obliged to submit the case under paragraph 446, a paragraph which prescribes that pending the investigation an officer in such a case may be suspended from duty, "in which case he will be placed under the same restrictions as an officer under open arrest."

Major-General Scobell acted. On his return to this country he requested "that the Army Council may cause inquiry to be made regarding the charge brought against me by Major Adam of having made a 'deliberate misstatement' as I consider that my honour is impugned by such a statement." The appellant was asked by the Army Council whether he wished to forward any statement in amplification or substantiation of his charge. He then indicated that it was something else he was after, namely, investigation into the administration of the War Office as well as into Major-General Scobell's conduct; and he did not comply with a most fair and reasonable request.

On investigation the charge was found to be baseless. The result was a complete acquittal of Major-General Scobell. In February, 1912, that gallant officer died. After his death, namely, in November, 1912, this action was brought.

Before adverting to the terms of the alleged libel I desire to refer to the situation of the War Office created by the demand for and the result of their investigation. It humbly appears to me that the right of the War Office in such a case is, first, to investigate and to condemn or acquit; and, secondly, in the case of an acquittal to publish that fact; while thirdly, on the head of publication, it has the right, and may properly consider it its duty, in justice to an officer who has been publicly wronged, to use its utmost endeavour to undo the wrong whithersoever that wrong may have penetrated.

With regard to the acquittal no complaint is now made. It is not maintained by the appellant that the charge was true; but he regrettably offers no apology for it, but a reason. That reason is of a sinister character—the charge was made against the honour of one officer as a means of forcing a public inquiry in the course of which blame might have been brought home to another.

But with regard to the second and third of these things, namely, the publication of the acquittal and its publication most widely,

the appellant challenges these transactions. I do not think that this challenge is well founded. In my view these things fall not only within the right, but, as I say, within the duty of the War Office. It may be said in general terms that whenever the character of one person is made the subject of a false charge communicated to another in a public manner, that other has the right to overtake the charge wherever it may have reached, and if possible to eradicate the falsehood by the refutation. In the case of an employer generously anxious to undo a wrong to a falsely accused servant the exercise of this right appeals to the former as a duty; and in the case of a public department dealing with the character and conduct of servants of the King the right is no less a duty to the aggrieved officers than also to the public at large. I desire in the next place on this head of the case to express my opinion that it will be only in the most exceptional cases that it will be considered a breach or excess of duty (at present I do not figure for myself any possible case) for the public department or other recipient of the public slander to have published too widely its refutation.

Much time and expense were needlessly caused, in my opinion, in this case on this latter head. What the War Office did was to send the notice of the acquittal to, inter alia, Reuter's and to the Press Association, and so to every newspaper of importance which would care to publish it. In my opinion, in doing so it was within its rights. To recognize that it erred in this particular would be to sanction calculations as to how far the fact of an acquittal of an officer of a charge against his honour should be made public—which calculations upon the part of the War Office would have been shabbily scrupulous. Furthermore, it has to be borne in mind, with regard to the whole question of the repudiation of a false charge, that it has not to be weighed in nice scales. This is so in regard to the language employed, a subject to which I shall presently advert. But it is particularly so with regard to the width of the area selected for the refutation of a wrong which has been done.

It is now necessary to point attention to the subject-matter of both charge and refutation. In his letter of November 12, 1912, the appellant treated the matter as "of the most vital public interest as affecting the pure administration of our Army." I am of opinion that this view is right. The subject-matter was an attack upon the

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honour of a soldier of the Crown. In my view this gives just occasion for investigation, and the War Office would be acting with scant justice if, having acquitted the officer, it kept the cleansing of his honour a secret and left the refutation without the widest and most effective publication. I am accordingly humbly of opinion that the occasion of publishing the deliverance of the War Office alleged to be libellous in this case was a privileged occasion, and that the scale and range of the publication of that deliverance were not only within the privilege, but were in themselves proper.

The terms of the published communication by the War Office which is alleged to be libellous have been cited by your Lordships. It took the form of a letter to Major-General Scobell announcing the result of the investigation made.

Privileged, however, as the occasion might be, it was contended that the communication went beyond the occasion and so was not protected by the privilege. I humbly think that this is a more correct way of stating the proposition than that usually adopted. Privilege is a term which is applied in two senses. There is a privileged occasion, and there is also said to be a privileged communication. The former expression is correct; the latter, strictly viewed, tends to error. What is meant with regard to a privileged communication is that it was protected as being within the scope of the privilege attaching to the occasion. The occasion is privileged, the communication is protected.

If, accordingly, and in so far as the communication deals with matter not in any reasonable sense germane to the subject-matter of the occasion, the protection is gone: the occasion with its privilege does not reach a communication upon this foreign and totally unconnected matter. Further, the introduction of such matter into a communication otherwise protected by the occasion may sometimes (this is conceivable) have a bearing upon the issue of whether the other and protected matter was published with express malice.

To apply these observations to the present case: It is admitted that the main and manifest object of the letter is to deal with the charge made against Major-General Scobell. But it is said that in acquitting the accused the department should not have dealt with the accuser. Upon the facts it is conceded that the truth was that Major-General Scobell had befriended Major Adam at a critical

period in the latter's career (when he had been called upon to retire from the Service), had interceded for him, and had prevailed upon the authorities to give him a chance in an extra-regimental appointment. The communiqué stated this "as showing the absence of hostile bias." I think it proved that; and in my humble opinion the communication in doing this did not enter upon any foreign field. What it stated was germane: indeed I go so far as to say that I think it would have been scant justice merely to say that the accuser's charge was disproved and to withhold what they knew, namely, that instead of the accused having ill-treated the accuser he had been emphatically his friend.

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Having reached this stage, the case, I humbly think, becomes, or should have become, a very ordinary one both in principle and in procedure. The occasion was clearly privileged—the communication dealt with matter germane to the occasion and was protected. Everything else was familiar ground, namely, that in such circumstances the inference that might otherwise have arisen from a statement prejudicial to the plaintiff is rebutted, and it is put upon him (the plaintiff) to establish affirmatively—in the words of Parke B.—that there was "malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made": *Wright v. Woodgate*. (1) The leading place in authority is still held by *Toogood v. Spyring*. (2) The most valuable judgment of Willes J. in *Henwood v. Harrison* (3) gathers the decisions together, including, especially, *Toogood* (2), and *Harrison v. Bush* (4) and *Whiteley v. Adams* (5), and sums them up in these terms: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

In actions for defamation it is the province and duty of the judge to settle the question of privilege, and that without reference of it, or of what goes to establish it, to the jury. The entire mass of

(1) 2 C. M. & R. 573, 577.

(3) L. R. 7 C. P. 606, 622.

(2) 1 C. M. & R. 181.

(4) (1855) 5 E. & B. 344.

(5) (1863) 15 C. B. (N.S.) 392.

H. L. (E.) authority is, in my opinion, in support of this view ; and it is the view adopted in every-day practice. It is not the province or duty of the jury to adjudicate upon or to settle the question of privilege. To use the language of Willes J. (*Henwood v. Harrison* (1)), “ It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury.” How far this rule was departed from in this case will be presently seen.

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As has been indicated, I am of opinion that this case is one in which privilege should have been affirmed by the judge and the jury directed accordingly to proceed to what was the one and only remaining question—a question of fact within their province, namely, whether express malice on the part of the defendant had been affirmatively established by the plaintiff.

It might have well been considered that there was nothing in the communiqué to which a libellous meaning could by any reasonable person be attached. This was not the course adopted by the learned counsel for the respondent : they not only admitted that there was matter which was open to a libellous construction, but they, as I read the proceedings, also admitted that the matter was in fact libellous. I fear that this caused much confusion : if it referred to the expressions “ removed from the regiment ” when the plaintiff was put upon half-pay, it put briefly what the plaintiff himself spoke to when, being asked the effect of putting an officer on half-pay, he said, “ It takes him off the regimental list,” and what the defendant said, in answer to the Court, namely, an officer “ put on half-pay is no longer an officer in the regiment.” The admission made appears accordingly to run counter to the facts ; and confusion might have ensued from a verdict of malice in such circumstances.

Fortunately this situation was saved by the learned judge, who closed the whole matter by ruling “ that there is no evidence of malice—not only no evidence of malice in the publication, but no evidence of malice on the part of the defendant in the publication of this document which would make it necessary for me to leave the case to the jury, if the occasion of its publication were a privileged occasion.”

(1) L. R. 7 C. P. 606, 628.

With this ruling it was not open to the jury to find malice as a fact, and, again quite properly, there is no such finding. The case, however, went on for days after this intimation; the inquiry ranged very wide, so wide that I feel convinced that the jury may very well have come to the conclusion that the case they were trying was a case not of libel but truly of wrongful dismissal; and I do not for myself see how the verdict obtained in such circumstances could have stood. It is certainly unusual to find a verdict of a jury taken not upon the fact "was there malice," not even upon elements which lead up to that as a fact, but upon the question of privilege and the elements which might be supposed to bear upon that question of law. I am humbly of opinion that the whole of that procedure was contrary to law.

What happened was that the learned judge asked from the jury answers to certain questions, and the jury found (1.) that the document was not of a public nature, (2.) that the defendant made the publication in the discharge of his duty as secretary to the Army Council, (3.) and for the purpose of affording information to the public, but that (4.) it was not proper for the public to know the subject-matter of the publication. They gave a verdict for 2000*l.* damages.

It is not necessary to consider whether these findings are supported by evidence. For it is clear beyond all question that the whole of them are in the region of the case relating to the purely and exclusively legal question of privilege. I respectfully agree with the submission made at the trial by the learned counsel for the respondent that "there is no issue of fact proper to be submitted to a jury in order to determine the privileged occasion."

The learned judge did not accede. On the contrary, he relied in determining the question of privilege on the jury's findings, his language being: "On these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion."

For the reasons already given I am of opinion that this procedure was erroneous. The respective provinces of judge and jury were confounded. I think the verdict so obtained cannot stand, and this quite apart from the large admission of irrelevant and misleading matter to which I have adverted.

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H. L. (E.) But, further—being of opinion that the occasion was privileged,
 1917 that the communication did not go beyond it, and that no malice
 ADAM was proved in making it—it humbly appears to me that judgment
 v. should be entered for the defendant, and that the course taken by
 WARD, the Court of Appeal was correct.

*Order of the Court of Appeal affirmed and appeal
 dismissed with costs.*

Lords' Journals, March 22, 1917.

Solicitors for appellant : *J. D. Langton & Passmore.*

Solicitor for respondent : *The Treasury Solicitor.*

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[IN THE HOUSE OF LORDS.]

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*Workmen's Compensation—Accident arising out of and in the course of
 the employment—Added risk—Workmen's Compensation Act, 1906
 (6 Edw. 7, c. 58), s. 1.*

The widow of a workman employed on a railway claimed compensation for the death of her husband. On the day of his death the deceased, with other workmen, was under orders to travel by train to a place further down the line to work there. The men arrived at a station where they had to change, and, having some time to wait for the next train, they started to cross the lines to a mess-room on the opposite side of the station where they could get hot water for their breakfast, which they had brought with them. On his way to the mess-room the deceased attempted to pass under the trucks of a standing goods train. The train moved and he was killed. The mess-room could have been reached without crossing the lines, but this way took longer, and the men for their own convenience habitually used the way across the lines. The county

* *Present* : LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD SUMNER.

court judge found that the accident did not arise out of or in the course of the employment :— H. L. (E.)

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Gane v. Norton Hill Colliery Co. [1909] 2 K. B. 539 distinguished. Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal (Lord Cozens-Hardy M.R., Pickford L.J., and Warrington L.J.) reversing an award made under the Workmen's Compensation Act, 1906, by the county court judge of Yorkshire in favour of the employers (the appellants).

The facts and the material parts of the judgment of the county court judge are set out in the judgment of the Lord Chancellor, and the facts are sufficiently summarized for the purposes of the argument in the head-note.

March 9. *Holman Gregory, K.C.*, and *J. P. Perks*, for appellants. The county court judge has made three findings—(1.) that it was no part of this workman's duty to go to the mess-room for his meals, (2.) that it was no part of his duty to go across the rails, and (3.) that it was no part of his duty to go under the trucks ; and there being evidence to support these findings they cannot be disturbed. As to (1.), the workman was at the station as a passenger, and he had no right to leave the platform. It was no part of his employment to go to the mess-room to get hot water for his breakfast : *Parker v. Owners of Ship Black Rock*. (1) As to (2.), rules 24 and 26 of the company's rules and regulations are in point. By rule 24 the company's servants are forbidden to expose themselves to danger, and reckless exposure of himself to danger on the part of any servant of the company is made an offence against the company's regulations ; and by rule 26 " the company's servants must not walk upon the line, except where it is necessary for them to do so in the execution of their duty." As to (3.), the authorities show that in attempting to pass under the trucks the man was exposing himself to an added peril which was not incidental to his employment : *Baker v. Earl of Bradford* (2) ; *Brice v. Edward Lloyd, Ltd.* (3) ; *Barnes v. Nunnery*

(1) [1915] A. C. 725.

B. W. C. C. 436.

(2) (1916) 114 L. T. 1144 ; 9

(3) [1909] 2 K. B. 804.

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Colliery Co. (1); *Plumb v. Cobden Flour Mills Co. (2)* In the last cited case Lord Dunedin, adopting the language of Lord Collins, points out the distinction between different kinds of prohibitions in considering the effect of a violation of the prohibition upon the question whether an accident arises out of the employment, and shows that the test is whether the order which was disobeyed limited the sphere of the employment or was merely a direction not to do certain things or to do them in a particular way within the sphere of the employment.

Gane v. Norton Hill Colliery Co. (3) is distinguishable, because it was there found as a fact that the line was habitually crossed by trucks and that there was an implied permission by the company to use that way, trucks or no trucks. Here the county court judge has found that going between the trucks was unreasonable and improper and there was no suggestion of any defined path across the lines. [The following cases were also referred to: *Blovelt v. Sawyer (4)*; *Hendry v. United Collieries (5)*; *Revie v. Cumming (6)*; *M' Laren v. Caledonian Ry. Co. (7)*; *Herbert v. Samuel Fox & Co. (8)*]

W. Shakespeare and Edgar Dale (with them *Edgar Lawn*), for respondent. In going to the mess-room the man was doing something that he was entitled by his employment to do, and if so he was doing something within the sphere of his employment in a negligent way. It was the common practice for the men to cross the line, and the county court judge finds in effect that this practice was recognized by the company. There was no genuine prohibition against it. All that the deceased did was to cross the line in a careless and improper manner. This case is governed by *Gane v. Norton Hill Colliery Co. (3)*, which was approved by this House in *Baker v. Earl of Bradford. (9)* The latter case is distinguishable, because there the man was not allowed to use the particular way in the existing circumstances. In *Hendry v. United Collieries (5)* the road which the man was following was not a recognized road, but was no road

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| (1) [1912] A. C. 44. | C. C. 483. |
| (2) [1914] A. C. 62. | (7) 1911 S. C. 1075; 5 B. W. |
| (3) [1909] 2 K. B. 539. | C. C. 492. |
| (4) [1904] 1 K. B. 271. | (8) [1916] 1 A. C. 405. |
| (5) 1910 S. C. 709; 3 B. W. | (9) 114 L. T. 1144; 9 B. W. |
| C. C. 567. | C. C. 436. |
| (6) 1911 S. C. 1032; 5 B. W. | |

at all. There being no dispute as to the facts, the question whether the accident arose out of the employment was a question of law, and the decision of the county court judge was that the man in taking his meals during working hours was not acting in the course of his employment. That is contrary to the authorities, which show that the employment is not limited to the time when the man is actually at work, and that if during the interval he is engaged in doing something which is for the benefit of his employers as well as of himself, e.g., in getting necessary refreshment on the premises—he is acting in the course of his employment: *Hoskins v. Lancaster* (1), which proceeds upon the decision of this House in *Cross, Tetley & Co. v. Catterall* (2), cited in *Sharp v. Johnson & Co.* (3) and in *Nicol v. Young's Paraffin Light and Mineral Oil Co.* (4); *Moore v. Manchester Liners.* (5) There being no finding of fact against the respondent, it is open to this House to draw the proper inference from the admitted facts, and the only reasonable conclusion is that this accident arose out of and in the course of the man's employment.

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Holman Gregory, K.C., replied.

The House took time for consideration.

March 23. LORD FINLAY L.C. My Lords, this case arises upon a claim for compensation under the Workmen's Compensation Act made by the respondent in respect of the death of her husband.

The claim was disallowed by the county court judge, but he added that if he had been able to make an award he would have given 175*l.*, and on appeal the Court of Appeal allowed the claim, directing an award for that amount.

From this decision the railway company now appeal to your Lordships' House, asking that the decision of the county court judge in their favour should be restored.

The case turns upon the question whether the accident arose out of and in the course of the employment of the deceased.

The deceased, George Thomas Highley, was employed by the appellants as a labourer on their railway. Early on the morning of

(1) (1910) 3 B. W. C. C. 476.

(3) [1905] 2 K. B. 139, 145.

(2) (March 16, 1905). Unreported.

(4) 1915 S. C. 439, 446; 8 B. W. C. C. 395, 400.

(5) [1910] A. C. 498, 500.

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August 12, 1915, he "checked on" at Sowerby Bridge, near Halifax, and was told by his foreman that he was to go to Goole to work there. He went with his foreman and other workmen by passenger train as far as Wakefield, where they were to change trains for Goole, and had to wait there for an hour and a half. The men had food with them, but in order to get hot water to prepare their breakfast they crossed from the platform on the north side of the Wakefield Station over the lines of railway between them and a mess-room on the south side, as shown in the plan. At the mess-room the man in charge was in the habit of supplying hot water to any servant of the company who applied for it. On arriving at the branch Goole line (coloured pink on the plan), to the south of the main line, the men found a train there which they supposed to be "dead," as, owing to the convexity of the line, the engine was not visible to them. They proceeded to pass under the couplings of the carriages, and the deceased was in the act of doing so when the train moved on and he was killed on the spot. The men could have got round to the mess-room from the down platform on which they were, without crossing any line of railway, if they had gone by a bridge over the line some little distance to the west, which would have taken them to the Calder Vale Road, but this would have taken some five or six minutes. They could also have avoided crossing the main line by making use of the subway shown in the plan, but this also would have been longer than the route which they took.

The foreman, Baker, stated in his evidence as follows, according to the judge's notes: "8—8.30, usual breakfast time. Usually we took our breakfast so as to go by 7.25 to Goole. Customary for us to go to this mess-room. We crossed metals—force of habit. Never warned not to take it. Have taken it since. Standing goods train there often, and we often pass through. No prohibition and no warning."

Cross-examined: "Could have got there without crossing metals at all; five or six minutes by the safe route. We had one and a half hours at Wakefield this morning. We went to east end of down platform and then crossed nine lines and turned to right to mess. There is a subway, and if we used that we would have only two lines to cross and the goods train would not have been in our way. We could have rounded the train, the end being only five or six trucks

off, but we went under. We chose the way we did for our own convenience. We knew we could go what way we thought fit.”

Under these circumstances the county court judge held that the accident did not arise out of the employment. The most material part of his judgment is as follows: “Mr. Lawn, for the applicant, argued that the taking of his meals in the course of his working hours was part of the duty he owed to his employers. I thought this argument quite untenable, having regard to *Parker v. Owners of Ship Black Rock* (1) and several other cases. There was no ‘contractual obligation here’ (to use Lord Sumner’s words), ‘no duty owed to the employer’ (Lord Parker), that the deceased should be where he was in order to get food or for any other purpose. He chose to go that way for purposes of his own, and in doing so to run an additional and quite unnecessary risk in going between the waggons. Hence I found the accident did not arise out of his employment. Mr. Perks, for the respondents, put in certain rules of the company prohibiting what the deceased did here. But in view of Baker’s evidence that they had always crossed this way without warning or prohibition ‘by force of habit,’ I could not hold the prohibition in the rules to be a ‘genuine prohibition’ as these words are employed by Lord Loreburn in *Barnes v. Nunnery Colliery Co.*” (2)

There is a certain amount of obscurity about this passage, but I think upon the whole that the learned county court judge must be taken as basing his judgment on two separate grounds: First, that the deceased, while going to make preparations for his breakfast, was engaged on his own business and not his master’s, and second, that by going between the waggons as he did he ran an additional and quite unnecessary risk, and that for this reason the accident did not arise out of his employment. I regard the later passage with regard to the company’s rules as relating merely to the fact that the deceased had walked upon the rails in infraction of rule 26 of the rules and regulations of the railway company, and as having no relation to his conduct in passing under the waggons.

The Court of Appeal reversed this decision. They held that getting their breakfast was covered by the men’s employment, and on this they were, I think, right. They further held that crossing

(1) [1915] A. C. 725.

(2) [1912] A. C. 44.

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the line under the trucks did not prevent the accident so occasioned from arising out of the employment, and in doing so appear to have been chiefly influenced by the decision of the Court of Appeal in *Gane v. Norton Hill Colliery Co.* (1) In that case the workman was injured while crossing a line of railway which was covered with trucks, the train having been set in motion while the plaintiff was crossing by getting under the buffers of the trucks. The county court judge had found that the accident did not arise out of and in the course of the employment, but his decision was reversed by the Court of Appeal. The ground of their decision was most clearly stated by Farwell L.J. and by Kennedy L.J. The former said speaking of the judgment of the county court judge: "He also found that the way the man went on the day of the accident was the usual one for him to go, and the usual one for other men to go. I understand that to mean that, notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route." And the latter (Kennedy L.J.) says: "No doubt one does look, as Farwell L.J. has said, with some closeness to the question when you have, as you have here, a way which at the time had trucks across it; but I read the finding of the learned judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself authorized by them to take, during the eighteen months he had been there."

The decision in *Gane's Case* (1) proceeded, therefore, entirely upon the finding that passage across a line of railway by going under the trucks which were upon it was recognized and authorized by the railway company. In the present case the Master of the Rolls, after referring to *Gane's Case* (1), said: "It seems to me that the principle in that case really covers this, and its facts are almost identical with it." Pickford L.J. says: "I agree that the appeal should be allowed on the authority of *Gane v. Norton Hill Colliery Co.*" (1) Warrington L.J. says: "So also with regard to the standing trucks upon the line. It seems to me that we cannot consistently with the case of *Gane v. Norton Hill Colliery Co.* (1) hold that that fact would make the crossing of that place outside the sphere of the man's employ-

(1) [1909] 2 K. B. 539, 545, 546, 547.

ment." And again : " If I am right in the way in which I have worked out the position, that the man was within the sphere of his employment in going to the mess-room, and in going to the mess-room across some lines of railway, and even between some standing trucks, then, even if in doing so he incurred an unnecessary risk (that is to say, if he might have gone some other way which would have been safer), that might be an improper way of doing that which was in the sphere of his employment, but it does not take it outside that sphere."

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My Lords, a finding of fact in one case cannot be a safe guide as to a finding of fact in another case. *Gane's Case* (1) proceeded solely upon the ground that what the man did was authorized by the company. Whether that finding was right or wrong is for the present purpose immaterial. I feel myself unable to draw any such inference from the facts in the present case, and I read the judgment of the county court judge as containing a finding that the deceased was not acting in the course of his employment in crossing under the trucks, and, therefore, that the accident did not arise out of it. It is on that ground I think his judgment right.

No doubt the distinction between acts done in the course of the employment but in an improper way and acts done outside the course of the employment altogether may be a fine one. This is illustrated by the difference of opinion in this House in the case of *Herbert v. Samuel Fox & Co.* (2) In the present case the facts seem to me to put it under the second of these two categories, and I am certainly not prepared to reverse the finding of the county court judge, which is, as I read it, to the effect that it was outside the course of employment.

It has been often pointed out that it is highly undesirable that findings of fact by the county court judge in workmen's compensation cases should be overruled in Courts of appeal. I would refer especially to what was said on this subject in the case of *Baker v. Earl of Bradford* (3) in your Lordships' House.

For these reasons, in my opinion, the decision in the Court of Appeal should be reversed and the decision of the county court judge restored.

(1) [1909] 2 K. B. 539.

(2) [1916] 1 A. C. 405.

(3) 9 B. W. C. C. 436.

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VISCOUNT HALDANE. My Lords, I think that in order to satisfy the words "injury by accident arising out of and in the course of his employment" the workman, or those claiming on his account, must show that two conditions have been satisfied. The injury by accident must have occurred as something which would not have occurred but for the circumstance of the employment and as having been something due to it, the employment, and it must further have occurred during its currency. As to the second of these conditions, there appears to me to be no room for doubt that it was fulfilled in the case before us. The real question which arises relates to the first condition.

As to this it must be borne in mind that the county court judge has expressly found that it was not fulfilled, and that a Court of appeal ought not to review his finding unless it is clear either that there was no evidence to support it, or that the finding was on the face of it erroneous in law.

My Lords, I think that there were facts proved on which the county court judge could find that to pass between the trucks of the goods train was not an act which the directions given to the men employed required them to do, and the only question open is whether it was an act which they were entitled in law to treat as one within their discretion in the execution of their duty. It was not found that the servants of the company had any general authority to walk over the line. There was indeed a rule, rule 26, which appears to have forbidden it excepting where some duty actually required it to be done. But it was also found that the company's servants had been in the habit of disregarding this rule, and that it was not enforced. Although, therefore, it might have been negligent to act as the workman did in the case before us, that would not in itself prevent the respondent from recovering. But none the less I think the existence of the rule was relevant evidence on the question whether what happened was due to the circumstances of the employment, and could be taken into account by an arbitrator in deciding whether the injury by accident was due to a risk assumed independently of the employment and outside it, as distinguished from being an injury which was the result of a mere act of negligence in executing the employment. In doing what he did in crossing the line by going under the trucks without ascertain-

ing whether the train might not begin to move, was the workman arrogating to himself a title to do something which he was neither engaged nor entitled to perform? This is one of the tests prescribed in the judgment of Lord Dunedin in *Plumb v. Cobden Flour Mills Co.* (1), and I think that it is the test which should be applied in the present case. It explains the meaning of the phrase which is often used, "added peril," as meaning a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself.

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There are grounds for criticism of the language in which the county court judge applied the law as thus laid down. He seems to have thought that the taking of his meals was not within the scope of the employment of the workman. But when he goes on to say that there was no duty on him "to be where he was in order to get food or for any other purpose" he does seem to find that the nature of the employment was not the cause of his going between the trucks. And I do not think that there was any evidence on which he could have found otherwise. The workman could easily have got the hot water he wanted without taking the altogether unnecessary peril of passing between the trucks, and I can discern no evidence which would justify a finding that this peril was other than an independent one which he added quite superfluously and entirely of his own initiative. It was accordingly not a case in which, as the Court of Appeal seems to have thought, he was doing what was within the sphere of his employment merely in a wrong way. In *Gane v. Norton Hill Colliery Co.* (2), an authority on which the Court of Appeal relied, the workman was indeed injured when trying to pass under a train of trucks. But there the way taken was the usual and most convenient one, and it was habitually taken by the workmen generally with the knowledge and consent of their employers. Here there is no evidence which establishes a real analogy to that case. Although I think that the county court judge might have given more precise reasons for his finding, I am of opinion that there was evidence to warrant it, and that it discloses on its face no error in law. The Court of Appeal ought therefore to have accepted it.

(1) [1914] A. C. 62.

(2) [1909] 2 K. B. 539.

H. L. (E.) LORD DUNEDIN. My Lords, the learned county court judge, as arbitrator, found that the accident did not arise out of the employment. It is said that this finding is in the circumstances not a finding of fact, but a conclusion reached upon a wrong view of the law. Much of the argument was accordingly directed to the determination of the precise import of two sentences of his judgment. After citing *Parker v. Owners of Ship Black Rock* (1) as negating the proposition that a workman when he goes for material for his dinner is fulfilling a duty to his employers (it is unnecessary here to examine what that case actually did determine), he goes on to say : " There was no contractual obligation here, no duty owed to the employer that he should be where he was in order to get food, or for any other purpose. He chose to go that way for purposes of his own, and in doing so to run an additional and unnecessary risk in going between the waggons. Hence I find that the accident did not arise out of the employment."

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Now the first remark that must be made on this is that if " purposes of his own " meant purposes which under the conditions of his employment he was neither compelled to do nor was contemplated as doing, then there was no actual need to say more. I can best make my meaning clear by citing the case of *Reed v. Great Western Ry. Co.* (2), where Lord Macnaghten expressed himself as follows : " Here the evidence shows " (the engine-driver had left his engine and gone across the lines to get a book from another engine-driver) " that it was for a purpose of his own, and not in the execution of his duty or in the interest of his employers, that the injured man exposed himself to the risk which caused his death. . . . At the time when the accident happened the man was about his own business, not about the business of his employers. For the moment he had put himself outside the area of protection which the Legislature has carefully marked out." Nevertheless, the learned judge, in saying more, may quite justifiably have given an additional reason for his judgment. If so, the second part of the sentence may legitimately mean that the man by his own unnecessary action incurred an added peril foreign to the ordinary perils of his employment, and that the accident accordingly did not arise out of the employment. In other words, suppose the judgment had run thus : The case fails

(1) [1915] A. C. 725.

(2) [1909] A. C. 31, 33.

in two particulars, either of which failures is fatal. I find as a fact that the man was engaged at the time on purposes of his own unconnected with his employment. I also find that the peril he encountered was not a peril which can be regarded as a possible incident of his employment, but was one of his own creation by his own ultraneous action. Such a judgment might have been attacked on the ground that there was no evidence which could reasonably support the findings, but it would, I apprehend, have been quite unimpeachable in point of law.

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The respondent's counsel, however, argues, and I think in this he has to a great extent the support of the learned judges of the appeal Court, that the real meaning of the second sentence is that in going the way he did the workman did not go out of the sphere of his employment, but only made his employment more dangerous by his own carelessness.

My Lords, if I had to decide, I should prefer the former construction, but in the view I take it is not necessary to determine which of these views is correct in order to decide this case. For the most that can be made of the second sentence for the respondent is that it does not actually find that the workman had, by adding a peril to his employment, so gone beyond his employment that the accident did not arise out of his employment. It is true that counsel argued that the reading of the sentence as he read it amounted to a finding, or rather amounted to an inferred finding, that the workman was in the course of his employment, and that the accident arose out of it. That appears to me to be a hopeless contention, and if upheld, would, I think, astonish no one so much as the learned county court judge. Leaving, therefore, as undetermined the true meaning of the second sentence, the case stands upon its own facts as proved and the inferences to be drawn therefrom. That, indeed, is the way that the Court of Appeal took it, and they then decided it upon the view that it was ruled by *Gane's Case* (1), which bound them. *Gane's Case* (1) is not binding upon your Lordships, though it has been cited with seeming approval in at least one case in this House. *Gane's Case* (1), however, when properly understood, was, in my view, rightly decided; but, with deference to the learned judges of the Court of Appeal, I do not think they have fully appreciated the

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state of facts on which the soundness of the decision in *Gane's Case* (1) entirely depends. They have treated it as if it settled that where a man left work by going over a siding and crawling under a waggon, and it was shown that many men had done so before, the risk entailed by crawling under the waggon was a risk of the employment. *Gane's Case* (1) did not decide that. It depended entirely on the view as to the facts that the method of leaving the works by a particular route which entailed crossing the siding and crawling under trucks, if any were standing there, was not only the usual method but was recognized as such by the employers. Farwell L.J. says : " Notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route " : and Kennedy L.J. says : " I read the finding of the learned judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself authorized by them to take, during the eighteen months he had been there." This is right, for if an employer, well knowing the facts, acquiesces in the employment being conducted in a certain way, even though that way involves what may be called an added peril, then really he is content that that peril should be held as an ordinary peril of the employment. But if it was not for that finding the judgment in the case of *Gane* (1) could not, in my opinion, be supported. Whether the finding was justified on the evidence is a matter with which we have nothing to do, but it is on that finding and that finding alone, that the law of the case depends. I should like to add that, though a decision of a Court of higher or equal authority binds another Court as to propositions of law, it cannot bind them as to the findings in fact. No doubt if the facts of two cases are so similar as to be practically identical the second Court will hesitate long before it comes to a different conclusion. Nevertheless, the facts of two different cases cannot, ex natura rei, be actually identical, and it is never incumbent on a Court to import the finding of fact in one case into another.

As to the law on the subject of added perils, I cannot add to what was said in the case of *Plumb* (2), as to which I would like to point out that, although it is contained in a judgment which bears my name,

(1) [1909] 2 K. B. 539, 546, 547.

(2) [1914] A. C. 62.

that was really the considered judgment of the House, and does not therefore at all rest on my individual authority. It is with insistence laid down in that judgment that the question is always whether the case falls within the words of the Act, and that "added peril" is a test only, though a very convenient test in certain circumstances. I refer particularly to the closing words of the judgment.

Now here there is not a shred of evidence bringing home to the appellants an acquiescence in the man choosing as a regular practice to crawl under trucks instead of going round them. That there was acquiescence in the practice of going to the mess-house, and of doing so by crossing the lines, I do not doubt. Neither do I doubt that the getting of hot water to prepare his breakfast was a legitimate incident of the man's employment, so that the facts here would not warrant a finding of the same sort which formed the basis of judgment in *Reed's Case*. (1) I hold that the man was entitled to go to the mess-house and entitled to cross lines to get there. But then it must be remembered that this is not the case of a defined road or track. The lines might be crossed at any point. They were free to be crossed on this occasion if the man had deviated five truck lengths to the right. Instead of that he ducked under the couplings of a set of trucks, not in a proper siding or lye, but on the regular goods running line, without taking the trouble to see if there was an engine attached. In doing so, in my judgment, he clearly added a peril to his employment to which the employer had given no sanction, with the result that the ensuing accident was not an accident arising out of his employment. I think the appeal should be allowed and the judgment of the county court judge restored.

LORD ATKINSON. My Lords, I concur. The learned Lords Justices appear to me to have based their judgments in this case on the supposed authority of the case of *Gane v. Norton Hill Colliery Co.* (2) I arrive at that conclusion from reading the following passages from their judgments. The Master of the Rolls, in commenting on the latter case, said: "It seems to me that the principle in that case really covers this, and its facts are almost identical with it." Pickford L.J. said: "Now, all I can say is, that it seems to me that that state of things is governed by the case of *Gane v.*

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 1917 going to the mess-room at all to be within the man's employment,
 LANCASHIRE I think the learned county court judge was wrong. I agree that the
 AND appeal should be allowed on the authority of *Gane v. Norton Hill*
 YORKSHIRE *Colliery Co.*" (1) Warrington L.J. expressed himself to a like effect.
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 HIGHLEY. With all respect to the learned Lords Justices, I am quite unable to
 Lord Atkinson. accept their view on this point. I think the facts of *Gane v. Norton*
Hill Colliery Co. (1) are quite different from those of the present case,
 as I shall presently endeavour to show, and that the cases are there-
 fore distinguishable. If they are not distinguishable, then, speaking
 for myself, I have no hesitation in saying that I think the case of
Gane v. Norton Hill Colliery Co. (1) was not rightly decided. I
 cannot accept the principle that, if an employer should give his work-
 man, employed by the day, permission merely to leave his place of
 work and traverse his employer's close to get to a place fit for him
 to eat his dinner or take his breakfast, the workman would be doing
 something within the sphere of his employment in scrambling over
 or crawling under a machine of the employer's which he might find
 in the close, especially when he was not confined to the use of any
 particular path in the close and could with ease quickly walk round
 the machine. If permission was given to the deceased and his
 fellows to cross the line at all from the down platform to the mess-
 house, no precise line of route was in any way defined or indicated
 either by the points of departure and arrival or in any other way.
 The evidence shows that the men were free to choose their own par-
 ticular route, to deviate, for instance, from the line they actually took
 at the start, so as to go round the tail of the train only five waggons
 away from the site of the accident. They must have seen this train,
 and with the opportunity of walking round it easily available they
 deliberately, and for all purposes unnecessarily, chose to advance
 upon the train of trucks itself and pass under it. In my view the
 mere permission to traverse a close not on any marked path or by
 any prescribed route does not imply a permission to climb over or
 scramble under a machine which may happen to lie across the route
 chosen arbitrarily by the person receiving the permission. Such an
 act if done by a workman would not, I think, amount to the negligent
 doing of an act within the scope of his employment according to the

(1) [1909] 2 K. B. 539.

principle of the case of *Blair & Co. v. Chilton* (1), but would be an act done altogether outside the sphere of that employment, according to the principle laid down with such clearness by Farwell L.J. in this very case of *Gane v. Norton Hill Colliery Co.* (2) He there said: "All those things that he (i.e., the workman) is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment. I would qualify this by saying that he must make a reasonable user of the facilities and rights which are given to him in this way. I am led to make that observation by Mr. Simon's argument with regard to the swing bridge. It is obvious to my mind that it cannot be said that because by the terms of a man's employment he was entitled to use a way out of the works over a swing bridge, he is entitled to jump across when the swing bridge is open for the purpose of some boat or barge passing through. It would not be a question of negligence or misconduct, or anything of the sort, but it would not be within the terms of his employment that he should use the swing bridge when open at all. It may well be within the terms of the employment to use a track when it is properly and fairly open, but not to use it when it is not." He then proceeds to deal with the finding of the county court judge, and said: "He does not rely on the fact that the trucks were there as shewing that the path was not open to the man to use if he thought fit, but he has found that the trucks and engines were put upon the line, and that the trucks would reach up to the screen where the coal was put on. He also found that the way the man went on the day of the accident was the usual one for him to go and the usual one for other men to go. I understand that to mean that, notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route." Kennedy L.J. says (3): "No doubt one does look, as Farwell L.J. has said, with some closeness to the question when you have, as you have here, a way which at the time had trucks across it; but I read the finding of the learned judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself

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(1) (1915) 8 B. W. C. C. 324.

(2) [1909] 2 K. B. 539, 545.

(3) [1909] 2 K. B. 547.

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authorized by them to take, during the eighteen months he had been there. On this particular occasion, it appears that two men immediately in front of him had passed over in safety, doing the same thing he did; therefore, if there was any inference to be drawn, it would be this—that somebody carelessly, although he ought to have known that the employers recognized this as the daily method of going from the works used by a large number of men, chose to set the trucks in motion when this unfortunate man was in a position to cross, and when he had a right to say ‘This is the way which my employers recognize, and their servants ought to know that it is being used by us.’ But, be that as it may, I am quite sure, if there had been anything which you might call a deviation from the natural course of the servant’s employment in going as he did, the learned judge would have found it; and, what is more, I have no doubt evidence would have been adduced by the other side to shew that it was so.” The facts of the case are not very fully stated. It is found that the trucks on this occasion went up to the screens where the coal was put on. How far they extended down the line, or whether they could have been readily outflanked or gone round, as it were, does not appear, or whether or not the route the men were authorized to take was direct from the foot of the stairs to the other side of the line. All the county court judge found upon this point was that route No. (3.) “was down some steps to the rails crossed by the bridge and across the rails on the level.” From these remarks of the learned Lords Justices, Farwell and Kennedy, I think it is clear that they thought the respondents’ workmen, including the applicant, were authorized by their employers not only to cross the rails at the particular point, but that when they should find their progress obstructed by trucks standing upon the rails they were also authorized to get through the line of trucks by passing under the buffers as the applicant had attempted to do. If that was the conclusion to which the Court of Appeal came as to the method of crossing expressly or impliedly authorized by the applicant’s employers, then it appears to me that there is not anything to quarrel with in their decision; but if they meant to decide that, wherever permission or authority is given by an employer to his workmen merely to cross a line of railway, that necessarily impliedly authorizes them to pass under or over any trucks they may, when

crossing, find in front of them, even when they can readily deviate and walk round those trucks, then in my view the decision was erroneous, and I refuse to follow it.

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Now if one contrasts the findings of the county court judge in this last case with the findings in the present case one will be struck at once with their dissimilarity. In the former the learned county court judge found that the way the applicant went on the day of the accident was the usual one for him to go, the usual way for the men who lived in the other direction to go, and the only way which he and they went except on Saturdays. He then adds: "I am driven to the conclusion, that being so, that it was with the knowledge of the respondents that the men went that way, and that the respondents never suggested to the men that they should not go that way." In the latter the only findings at which the learned judge arrived are: (1.) That the prohibition in the rules was not a genuine prohibition within the meaning of Lord Loreburn's judgment in *Barnes v. Nunnery Colliery Co.* (1); (2.) that the accident did not arise out of the workman's employment. There is no finding by him, such as there was by the county court judge in the former case, to the effect that it was the usual practice for men in the position of the deceased and the other employees of the respondents who desire to reach the mess-house to cross these rails where the deceased attempted to cross them; no finding to the effect that it was the usual practice of such persons, when in the act of crossing they happened to find before them a train of trucks they could readily have walked round, to pass under the train instead of going round it; nor yet a finding to the effect that these practices, if they existed, were ever known to or consented to by the respondents or their agents. No doubt it is well established, where the relevant and material facts in such a case as this are either found or not disputed, that the question of whether the accident arose out of the workman's employment is a question of law, not of fact: *Herbert v. Samuel Fox & Co.* (2); *Gane v. Norton Hill Colliery Co.* (3) In the absence of all findings such as above mentioned it is necessary to examine the evidence somewhat in detail to discover what material or relevant facts were taken as undisputed. I do not know

(1) [1912] A. C. 44.

(2) [1916] 1 A. C. 405.

(3) [1909] 2 K. B. 539, 544.

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whether I am correct in thinking that in the Court of Appeal it was rather assumed that if once it was shown that the deceased had the right to cross to the mess-house there was an end of the case, and that in doing what he did he was acting within the sphere of his employment—negligently, no doubt, but still within the sphere of his employment. If it was so assumed, then, with all respect, I think the assumption was erroneous. It might well be that the deceased had permission to go across the line to the mess-house, and yet, on the sound principle laid down by Farwell L.J. in *Gane v. Norton Hill Colliery Co.* (1), that the act done by him amounted to an unreasonable use of the facilities and rights given to him, and was therefore an act outside the sphere of his employment and not merely an act within that sphere done negligently. Of course, if the deceased was entitled in crossing the line to choose a route which brought him up against a train of trucks which he could readily have avoided, and then to pass under them, as he attempted to do, his omission to ascertain whether the train was a live or dead train before he attempted to pass would amount to negligence.

The notes of the learned judge on the user of this privilege are rather condensed. Baker, who, like the deceased, was not a member of the Wakefield staff, was the chief witness for the applicant. Both of these men were rather in the position of travellers who had missed their train and had one and a half hours to wait for the succeeding train to their destination. In his examination-in-chief Baker said: "It was customary for us to go to this mess-house. We crossed metals—force of habit. Never warned not to take it (i.e. the route) across. There were goods trains there often, and we passed through—no prohibition and no warning." Hirst, a goods train guard, says trains often stand on the granary siding and men pass through often. He does not say whether these men were members of the Wakefield staff or not. It is clear from this evidence, and was not disputed, that, as I have already pointed out, there was no marked or defined route across the line which men took on their way to the mess-house—no particular point from which they should start or at which they should arrive. They might, consistently with this evidence, have crossed the line where they chose, no limits being

(1) [1909] 2 K. B. 539, 544.

indicated. This, therefore, is the kind of thing which must be held to have been expressly or impliedly authorized by the respondents in order to sustain the applicant's case. It is a thing wholly different in kind from passing over an obstacle which so blocks the way and arrests the privileged wayfarer's progress that he must either stand still and give up the attempt to pass or surmount the obstacle; so that even if it be assumed that the deceased had the right to go to the mess-house, which has not been found, his act in attempting to pass as he did was, I think, outside his sphere of employment, and accordingly the accident by which he lost his life did not arise out of his employment. I do not think that the case of *Brice v. Edward Lloyd, Ltd.* (1) referred to by the Master of the Rolls, is in conflict with this conclusion. The decision in that case did not mean that a workman is at liberty to take his meals on any part of the employer's premises, however dangerous or unsafe the place may be. And Farwell L.J. repeated what he had said in *Gane v. Norton Hill Colliery Co.* (2) in reference to the swing bridge and proceeded to say: "It is now well settled that the word 'employment' in the Act is not to be confined to actual work. In my opinion it extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises and to take his meals on the premises. But he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden. . . . In the present case, this place being a dangerous place was obviously forbidden to the men, not in the sense of express prohibition, but in the sense that it would not occur to any one that it would be allowed." It was accordingly held that the act which brought about the accident was outside the scope of the deceased's employment, and that the accident therefore did not arise out of that employment. It will be observed that the learned Lord Justice put unreasonable acts and forbidden acts on the same level, each lying outside the sphere of the workman's employment. Well, if all the privilege given to the workman in the present case was merely to cross the rails to the mess-house, nothing could well be more unreasonable than the mode in which he attempted to exercise it.

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(1) [1909] 2 K. B. 804, 809.

(2) [1909] 2 K. B. 539.

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The appeal should, I think, be allowed, with costs here and below.

LORD SUMNER. My Lords, whether in any given case an accident arises on the one hand out of the injured person's employment, although he has conducted himself in it carelessly or improperly, or, on the other hand, arises not out of his employment but out of the fact that he has gone outside the scope of it, or has added to it some extraneous peril of his own making, or has temporarily suspended it while he pursues some excursus of his own, or has quitted it altogether, are all questions which, often as they arise, are susceptible of different answers by different minds, and are always questions of some nicety. So it is here. I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts. There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury.

My Lords, on the facts of this case, uncontradicted, accepted on all hands and found by the learned county court judge, the deceased was killed because he was passing between two of the trucks of a train at the moment when the engine shunted it. I accept that it was in the course of his employment that he should have been preparing to get his breakfast at the time in question, that he should

have been going to the mess-room for hot water for that purpose, and that, in order to get the hot water, he should have been traversing a number of pairs of rails, one of which was and others of which might have been in use by moving or movable trains. All the same, the question is how came he between the trucks when the train was put in motion, not how came he upon the part of the station yard occupied by rails.

The plan which was put in evidence before the county court judge shows that there was no fixed track across the railway lines leading from the platform at which the deceased alighted to the mess-room, nor was there any evidence that the workmen were left free to shape their own course across the rails. There was no evidence of any practice known to the employers for workmen to pass between the trucks of a train, whenever and wherever they encountered them, in order to save the trouble of going round the end of it. I think that the present case is within the principles applied in the cases of *Hendry* (1) and of *M'Laren* (2) and is distinguishable from that of *Gane v. Norton Hill Colliery Co.* (3), the basis of which I take to be that in that case there was found to have been a track or route between given points by which the workmen, to the knowledge of their employers, were accustomed to leave work when so minded, although it was occasionally obstructed by a line of waggons drawn across it.

My Lords, the reasons which the learned county court judge gives for his award in the present case show sufficiently that he found the deceased and his companions to have been making a route for themselves in circumstances not only of additional but of obvious and unnecessary peril rather than following a recognized route, which, by being tolerated in spite of the printed regulations, had come within the ambit of the employment. I do not, therefore, think it necessary to consider whether his reasoning was in all respects right, though, as it seems to me, he pressed the observations quoted from the case of the steamship *Black Rock* (4) to purposes for which they were not intended.

With great respect to the judgments of the Court of Appeal in a matter where opposite opinions may well be entertained, I think

H. L. (E.)

1917

LANCASHIRE
AND
YORKSHIRE
RAILWAY

v.
HIGHLEY.

Lord Sumner.
—

(1) 1910 S. C. 709.

(3) [1909] 2 K. B. 539.

(2) 1911 S. C. 1075.

(4) [1915] A. C. 725.

H. L. (E.) that on the uncontradicted evidence, accepted, as I take it to have
 1917 been, by the judge of fact, the present is a case of an accident arising
 LANCASHIRE not out of but outside of the employment, since at the time of his
 AND death the workman was in no sense doing that which was part of or
 YORKSHIRE fell within his employment (whether he was or was not acting with
 RAILWAY care therein), but was for his own purpose, namely, the convenience
 v. HIGHLEY. of the moment, thoughtlessly pursuing a course which fell outside
 Lord Sumner. of his employment. In that act unhappily he met his death. The
 proposition before the Court of Appeal was that the learned county
 court judge had arrived at his award on the facts either in a manner
 which showed that his conclusion had been controlled by some error
 of law, or on a supposition of the existence of evidence, of which in
 fact there was none that a judicial tribunal could reasonably give
 effect to. I do not think this proposition was made out, and there-
 fore the appeal should succeed.

*Order of the Court of Appeal reversed and award of the
 county court judge restored. The respondent to pay
 the costs in the Courts below and also the costs of the
 appeal to this House.*

Lords' Journals, March 23, 1917.

Solicitors for appellants: *Woodcock Ryland & Parker, for A. de C.
 Parmiter, Manchester.*

Solicitors for respondent: *Burton, Yeates & Hart, for Hart,
 Jackson & Sons, Barrow-in-Furness.*

[PRIVY COUNCIL.]

THE GERMANIA.

J. C.*

ON APPEAL FROM THE PRIZE COURT (ENGLAND).

1917

Prize Court—Outbreak of War—Days of Grace—Enemy Yacht—“ Navire de Commerce ”—Hague Convention, No. 6, arts. 1, 2.

March 20.

A racing yacht is not a merchant ship (“ navire de commerce ”) within the meaning of the Hague Convention, No. 6, arts. 1, 2 (1), and consequently is not entitled to the immunity from confiscation accorded to merchant ships thereunder. An enemy racing yacht seized in a British port immediately upon the outbreak of war is, therefore, subject to condemnation as prize according to the ordinary rule applied to enemy property seized in port.

APPEAL from a decree of the President of the Admiralty Division (in Prize) ; reported [1916] P. 5.

The appeal was on behalf of the German owner of the *Germania*, a racing schooner yacht, which was seized in the port of Southampton on August 6, 1914, war between Great Britain and Germany having broken out on August 4, 1914. The President of the Admiralty Division (Sir Samuel Evans) on October 28, 1915, ordered the condemnation of the vessel as enemy property, and that she be sold by the Marshal.

The facts are stated in the judgment of their Lordships.

* *Present* : LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) Hague Convention, No. 6, art. 1: “ When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed after being furnished with a pass, direct to its port of destination or any other port indicated to it. . . . ”

Art. 2: “ A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.”

J. C. 1917. Feb. 23, 27. *Bateson, K.C.*, and *C. R. Dunlop*, for the
 1917 appellant. The *Germania* should have been detained and not con-
 THE fiscated. Since 1854 merchant ships, by comity of nations, have
 GERMANIA, been allowed days of grace to leave a hostile port upon an outbreak
 of war: Westlake's International Law, 2nd ed., part 2, pp. 42, 43. This modern relaxation of the severity of the old rules applies a fortiori to a yacht visiting a foreign port to take part in a regatta. Further, the expression "navire de commerce," translated officially "merchant ship," in the Sixth Hague Convention means every kind of vessel except a "navire d'état." That view has been generally adopted: Proceedings of the International Naval Conference, 1909, Blue Book Cd. 4555, p. 221; Russian Prize Rules, 1905, r. 6 (see 1 Russ. & Jap. P. C. 312); German Prize Court Orders, 1911 (Berlin Official Gazette, August 3, 1914); Schramm's "Das Prisenrecht," Berlin, 1913, p. 98; Posse in "Zeitschrift für Internationales Recht," Leipzig, 1911, p. 160. The German Prize Court condemned a yacht, the *Primavera* (1), seized at Antwerp, as being a "Kauffahrteischiff," which word represents "navire de commerce" in the German official translation of the Sixth Convention. In England yachts have always been subject to the Merchant Shipping Acts. The *Germania* was entitled to the protection given to merchant ships by the Order in Council of August 4, 1914. (2) An order for detention in the form of that in *The Chile* (3) and *The Gutenfels* (4) should have been made. [Order XVIII., r. 1, of the Prize Court Rules was also referred to.]

The respondents' counsel were only called upon to argue whether the yacht came within the Sixth Hague Convention.

Sir Frederick Smith, A.-G., and *G. T. Simonds*, for the Procurator-General. The preamble to the Sixth Hague Convention shows that its purpose was the security of international commerce. The class of vessel intended by "navire de commerce" consequently does not include a yacht which is neither used, nor capable of being used, for commercial purposes. The reference to cargo in art. 4 indicates that it is only trading vessels which are included. In works of French jurists the phrases "navire marchand" and "navire de commerce"

(1) Lloyd's Register, August 10, 1916. lation, vol. 1, p. 138.

(3) [1914] P. 212.

(2) Manual of Emergency Legis-

(4) [1916] 2 A. C. 112.

are used interchangeably—e.g. Lys, “Droit International,” vol. 3, p. 55. The Prussian law of October 25, 1867, by s. 1 explains “Kauffahrteischiffe” as meaning vessels intended for voyages for purposes of gain. In *The Oriental* (1) the President also held that a yacht was not a merchant ship within the meaning of the Convention.

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C. R. Dunlop in reply. If there is a doubt as to whether the yacht is included in the Convention she should be detained until the course taken in similar cases by enemy Governments at the end of the war is ascertained. Carrying cargo is not a test, since “navire de commerce” undoubtedly includes passenger ships, tugs, and cable-laying ships. “Commerce” in French imports more than trade intercourse.

March 20. The judgment of their Lordships was delivered by

LORD PARMOOR. The *Germania* is a sailing schooner racing yacht of 366 tons Y.M., 191 tons gross and 123 tons net register, built and registered at the port of Kiel. She was built in 1908 and belonged to Gustav Krupp von Bohlen. In the claim of Baron Friedrich von Bülow, on behalf of the owner, she is described as a racing sailing yacht of no value or utility for any commercial, naval, or military purpose, nor adaptable for any such purpose, and as being no part of the commercial, naval, or military resources of the enemy.

On July 27, 1914, the *Germania* arrived at Southampton to take part in the Cowes Regatta, and was dry-docked for the purpose of repairs, cleaning, and painting. On the outbreak of war she was in the yard of Messrs. Summers & Payne at Southampton, and was seized and detained by the officer of Customs. A decree of detention until further order of the Court was made on September 24, 1914. Subsequently, on September 23, 1915, notice was sent to the appellant’s solicitors that an application would be made to the Prize Court to condemn the *Germania*. The application was made on October 28, 1915, and on the same day a decree was made condemning the *Germania* as lawful prize. It is against this decree that the appeal on behalf of the owner of the *Germania* is brought.

Two contentions were raised before their Lordships at the hearing

(1) (15) 1 Lloyd’s Prize Cases, 355.

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of the appeal. In the first place, it was said that a racing yacht, such as the *Germania*, should not be regarded as property liable to confiscation and condemnation as droits of admiralty. No authority was adduced in support of this contention. In the opinion of their Lordships, there is no principle in prize law which would place a racing yacht in a special category, or exempt it from the ordinary rule that enemy property seized in port after the outbreak of war is liable to confiscation and condemnation as droits of admiralty.

It was contended, secondly, and to this point the argument of the counsel for the appellant was mainly directed, that the *Germania* was “un navire de commerce” within the meaning of art. 2 of the Sixth Hague Convention, and as such was not liable to confiscation. If the *Germania* is not “un navire de commerce,” it is not within the protection of art. 2 and it is unnecessary to consider the further conditions specified in the article. In order to make good his contention that the *Germania* was “un navire de commerce” Mr. Bateson argued that any private vessel should be regarded as “un navire de commerce,” and that every vessel is included within that designation which is not “un navire d'état.” There is nothing in the context of art. 2 which would suggest that the expression “un navire de commerce” includes every class of private vessel; but reference was made to the proceedings of the International Naval Conference held in London on February 25, 1909, and to an extract from a Prize Court order published in Berlin on April 15, 1911. The object of these references was apparently to suggest that there was some ambiguity in the language of art. 2, but their Lordships do not find that the language is ambiguous, and quotations from documents published subsequently to the Sixth Hague Convention, and dealing with a different subject in another context, cannot affect the question of construction which comes before their Lordships for decision in this appeal. The preamble of the Sixth Hague Convention states that the signatory Powers “anxious to ensure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a convention to this effect.”

These words clearly indicate that the purpose of the Convention is the security of international commerce, and that the operations undertaken in good faith and in process of being carried out are operations of a commercial character. It is in accordance with this purpose that art. 2 protects under the specified conditions "le navire de commerce," or, to use the English translation, "a merchant ship." A vessel which is described in the claim as a vessel of no value or utility for any commercial purpose, nor adaptable for such purpose, and not any part of the commercial resources of the enemy, is not in any sense a merchant ship or entitled to the protection of art. 2 of the Sixth Hague Convention.

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The appellant further asked that an order should be made in the same form as in the case of *The Gutenfels* (1), but their Lordships are of opinion that that form of order is not applicable to the case of a vessel which is clearly not comprehended within the class of vessels to which alone the Sixth Hague Convention affords protection.

In the result the appeal fails and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Kenneth Brown, Baker, Baker & Co.*

Solicitor for respondent : *The Treasury Solicitor.*

(1) [1916] 2 A. C. 112.

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[PRIVY COUNCIL.]

THE STANTON.

ON APPEAL FROM THE PRIZE COURT (ENGLAND).

*Prize Court—Practice—Security for Costs—Claimant out of Jurisdiction
tion—Judicial Discretion—Prize Court Rules, Order XVIII., r. 2.*

By Order XVIII., r. 2, of the Prize Court Rules “any person instituting a proceeding, other than a cause for condemnation, or making a claim, and being ordinarily resident out of the jurisdiction of the Court, may be ordered to give security for costs, . . . , and the proceedings may be stayed until such security is given.”

The Procurator-General claimed the condemnation, as goods having an enemy destination or as enemy property, of pork consigned from the United States to the appellant in Sweden. The appellant, who was ordinarily resident at Gothenburg, filed a claim to the goods as his property intended exclusively for consumption in Sweden, the claim being supported by an affidavit and exhibited documents. The President, without any evidence on the part of the Crown, made an order that the appellant should give 100*l.* security for costs:—

Held, that it did not appear that the discretion conferred by the rule had not been exercised judicially, and that the order was valid.

APPEAL by special leave from an interlocutory order made by the President of the Admiralty Division (in Prize).

The appellant was a Swedish subject carrying on business, and ordinarily resident, at Gothenburg. On January 27, 1916, the Procurator-General issued a writ claiming the condemnation of fifty boxes of salt pork of the value of about 800*l.* shipped from the United States in the Swedish steamship *Stanton* and consigned to the appellant at Gothenburg. The goods were seized in the port of Bristol on December 31, 1915. The writ claimed that the goods had an enemy destination or were enemy property. The appellant on May 16, 1916, entered an appearance. On August 2, no further step having been taken, the Procurator-General applied by summons that the appellant should be ordered to give security for

* *Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, SIR WALTER PHILLIMORE, BART., and SIR ARTHUR CHANNELL.

costs. The President adjourned the summons and ordered the appellant to file his claim and evidence in support.

The appellant filed a claim on the ground that the goods were his property and were neutral goods intended exclusively for consumption in Sweden. The claim was supported by an affidavit by the appellant verifying his case and exhibiting the bill of lading, a policy of insurance with the Swedish State War Risks Insurance Commission, a declaration that the goods would not be re-exported, and correspondence in connection with the purchase. No evidence was filed on behalf of the Crown.

On October 16, 1916, the President, after hearing counsel in chambers, ordered that the appellant should give 100*l.* security.

The Judicial Committee granted the appellant special leave to appeal.

1917. Feb. 27. *Le Quesne*, for the appellant. There was no evidence before the learned President upon which, in the exercise of the judicial discretion conferred by Order XVIII., r. 2, the order could properly be made. The mere fact that a claimant is resident out of the jurisdiction is not sufficient. Under the old practice a claimant was bound to give security. [Pratt's Story on Prize Courts, pp. 7, 8, 203; Naval Prize Act, 1864, s. 23.] The rules made in 1898 under the Prize Court Act, 1894, s. 3, relaxed the rule by allowing bail to be given. In the present rule the word "may" was deliberately introduced; the Prize Courts (Procedure) Act, 1914, s. 1, at the same time repealed the compulsory provision of s. 23 of the Naval Prize Act, 1864. The intention was that although a claimant is out of the jurisdiction he should not be ordered to give security unless some ground is shown. The rule was founded upon the Rules of the Supreme Court, Order LXV., r. 6 (*a*). Prize proceedings, however, are begun by a writ issued by the Procurator-General, and by Order XL., r. 7, a claimant who does not appear is treated like a defendant in default. He is not in the position of a plaintiff, and is not the "actor" or originator of the proceedings: *In re Pretoria Pietersburg Ry. Co.* (No. 2). (1) Further, the practice in a civil action is based upon the consideration that an unsuccessful litigant is almost invariably condemned in costs. In the Prize Court, however, an unsuccessful claimant is condemned in costs only

(1) [1904] 2 Ch. 359.

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when his claim is grossly fraudulent : *The Ida*. (1) An order under Order XVIII., r. 2, should only be made if reasons are shown for supposing that the claim is fraudulent.

Sir Frederick Smith, A.-G., and *R. A. Wright*, for the respondent. The rule refers to any person "making a claim"; it is therefore immaterial whether a claimant is technically in the position of a plaintiff or of a defendant. Upon the analogy of the rule in civil actions the true effect of Order XVIII., r. 2, is that when the claimant is ordinarily resident out of the jurisdiction an order is to be made, unless there is some special reason to the contrary : *Crozat v. Brogden*. (2) The President took a less stringent view, and the matter was treated before him as one of judicial discretion. He was entitled to act upon his large experience of cases similar to the present which upon investigation have proved to be fraudulent. The practice of the Crown is to apply for security only in cases in which if the claimant fails he is necessarily convicted of untruth or concealment.

Le Quesne replied.

March 22. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. This appeal turns entirely on the true meaning and effect of rr. 2 and 3 of Order XVIII. of the Prize Court Rules, 1914. These rules govern the practice of the Court with regard to security for costs, and no question is raised as to their validity. It should be noticed that by Order XLV., in cases not provided for by the rules, the old practice in prize proceedings is to be followed, and in considering the question at issue on this appeal it is both legitimate and useful to refer to the former practice.

The practice of the High Court of Admiralty in prize proceedings, with reference to security for costs, was from time to time prescribed or sanctioned by statute. The last statute dealing with the matter was the Naval Prize Act, 1864. By s. 23 of that Act all claimants in proceedings for condemnation were required to give security for costs in a sum of 60*l*. This is remarkable for two reasons. First, a claimant in condemnation proceedings was not as a general rule ordered to pay costs unless he had put forward a fraudulent or

(1) (1854) Spinks, 26; 2 Eng. P. C. 268. (2) [1894] 2 Q. B. 30.

unjustifiable claim. Secondly, a claimant was at any rate, up to the preliminary hearing, in the position of a defendant rather than a plaintiff, the onus probandi till then at any rate resting with the captors. Nevertheless, he was required to give security.

Sect. 23 of the Naval Prize Act, 1864, was repealed by s. 1 of the Prize Courts Procedure Act, 1914, as from the day on which the Prize Court Rules, 1914, came into operation. Under these circumstances rr. 2 and 3 of Order XVIII. must be looked upon as relaxing in favour of claimants the rights with regard to security for costs which the Crown, or the captors who represented the Crown, possessed under the earlier practice. Claimants ordinarily resident within the jurisdiction of the Court need no longer give security. Claimants ordinarily resident out of the jurisdiction of the Court may, even though temporarily resident within such jurisdiction, be ordered to give security in such manner and amount as the judge may direct. Whatever be the precise meaning of the expression "within the jurisdiction of the Court," the present claimant certainly does not ordinarily reside within such jurisdiction, and therefore the President had power to make the order appealed from.

It is, however, contended that the discretion vested in the judge under the rules in question is a judicial discretion, and that the President, if he can be said to have exercised any discretion at all, did not exercise it judicially but in complete disregard of all considerations by which a judge in exercising such a discretion ought to be influenced. In particular, he is said to have entirely disregarded the fact that on the evidence before him the Crown had entirely failed to make out any case for condemnation of the goods the subject of the claim, and that the claimant, on the other hand, had fully made out a case for their release. The onus probandi, it was said, still rested with the Crown, and the appellant, being in the position of a defendant and not of a plaintiff, should not have been ordered to give security at all.

Their Lordships entertain no doubt that the discretion conferred on the Prize Court judge by the rules in question is a judicial discretion, but except to this extent they do not think the appellant's argument is sound. The rules to be interpreted are not rules to be followed by a Court which had not, according to its usual practice,

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ordered security against litigants who were not in the position of plaintiffs. On the contrary, they are rules to be followed by a Court in which, according to its former practice extending back for over a century, all claimants, wherever they resided, and whether in the position of plaintiffs or otherwise, had been compelled to give security. If according to the former practice of the High Court of Admiralty claimants in prize proceedings had only been ordered to give security if they asked for and were granted further proof after the preliminary hearing, the case might have been different; but this was not the practice. Moreover, r. 2 of Order XVIII. expressly places claimants in condemnation proceedings on the same footing as persons instituting proceedings other than proceedings for condemnation. In other words, it treats all claimants as it treats plaintiffs. Their Lordships therefore are of opinion that neither the merits of the claim as they appear from the evidence already filed, nor the onus probandi, having regard to such evidence, are the determining factors in considering whether the discretion has been properly exercised.

The object of the rules appears to be this. Persons ordinarily resident within the jurisdiction usually have property within the jurisdiction against which process of execution will lie should they be ordered to pay costs. These, therefore, need not be required to give security. Persons ordinarily resident out of the jurisdiction have, as a rule, no property within the jurisdiction against which process will lie in a similar event. These, therefore, may be ordered to give security. The fact that they are ordinarily resident outside the jurisdiction, if nothing more be proved, will in an ordinary case justify the judge in ordering security. But if something more be proved—for example, if it be established that the claimant has property within the jurisdiction against which process will lie—the judge, in exercising his discretion, must take this into account. It would be in the highest degree inconvenient if the judge were in every case bound to consider the onus probandi as it appears on the evidence already filed, or the merits of the claim if it fell to be determined upon this evidence. He is, no doubt, entitled to look into both matters if he thinks fit—at any rate, on the question of the amount to which security should be ordered; but neither point affords the criterion as to whether security ought or ought

not to be directed. The judge is entitled, on the one hand, to bear in mind that when the claim is bona fide made costs are not as a rule ordered against an unsuccessful claimant. He is, on the other hand, entitled to be guided by his own experience as to the type or kind of claim which usually turns out to be fraudulent. While bearing in mind that the object of the rule is to safeguard the Crown in the event of unsuccessful claimants being ordered to pay costs, he should not, either in ordering security or fixing its amount, ignore the effect of the order he proposes to make in increasing the difficulty of enforcing bona fide rights.

Their Lordships are not satisfied that in making the order appealed from the President either ignored any matter which he ought to have considered, or took into account any matter which he ought to have ignored. In other words, they are not satisfied that he did not exercise the discretion conferred on him by the rules in a judicial manner and on proper grounds, both as to amount and otherwise. It follows that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Botterell & Roche.*

Solicitor for respondent : *The Treasury Solicitor.*

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[PRIVY COUNCIL.]

THE DAKSA.

ON APPEAL FROM THE PRIZE COURT (GIBRALTAR).

*Prize Court—Goods in Transit—Transfer in Apprehension of War—
Fraud on Belligerent's Rights—Seizure by Allied Belligerent.*

A transfer of goods at sea induced by the transferor's apprehension of hostilities between the State to which he owes allegiance and another State is deemed to be in fraud of the belligerent rights of that other State only; it is not invalid as against a capture by a belligerent State allied thereto unless it is proved, or to be presumed, that it was made in apprehension of war with that allied State.

A presumption arises from the existence at the time of the transfer of a general apprehension of war with the State of the captors, but can be discharged by showing that the transfer was made pursuant to a pre-existing contract.

The Southfield (see note, p. 390, post) approved.

APPEAL from a decree of the Prize Court (Gibraltar), made June 16, 1916.

The respondents, Louis Dreyfus & Co., were a French firm of grain merchants carrying on business in Paris and London and, until the outbreak of the war, having a branch at Hamburg managed by one Meyer, a German subject. In proceedings in the Prize Court at Gibraltar they claimed as their property a parcel of 1240 chetverts (about 200 tons) of barley forming part of the cargo of the Austrian steamship *Daksa*, which was seized and taken as prize at sea by a British cruiser and taken into Gibraltar. The barley was consigned by Russian shippers to be delivered to their order at Hamburg, the bills of lading being indorsed in blank. The respondents filed affidavits alleging that by a contract made by Meyer on their behalf on July 13, 1914, they bought from Ehlers & Löwenthal, a German firm at Hamburg, 1240 chetverts of barley for shipment by the *Daksa*; that on July 31, while the barley was in transit, the sellers presented to them the bills of lading and insurance policy under that contract, together with a preliminary invoice for the price, so far as it could be ascertained before weighing; that on

* *Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR SAMUEL EVANS.

the following day payment of the amount of the invoice was made to the sellers, and the documents were handed to Meyer on the respondents' behalf; that the payment was duly notified to the respondents' head office. The contract of July 13, 1914, was not produced, it being stated not to have been brought away from Hamburg upon the outbreak of war. The provisional invoice referred to the contract as being upon c.i.f. terms.

War was declared between Russia and Germany on August 1, between France and Germany on August 3, and between Great Britain and Germany on August 4, 1914.

The Chief Justice of Gibraltar found upon the facts that the transfer was made by Ehlers & Löwenthal and by Meyer in the expectation of immediate war with France and Russia, but that the expectation of war between Great Britain and Germany was not present to the minds of the parties so as to induce them to be guided by it in their business arrangements. Upon the authority of *The Southfield* (1) he accordingly ordered that the proceeds of the barley, which had been sold by order of the Court, should be released to the respondents.

The Attorney-General and King's Proctor for Gibraltar, on behalf of the Crown, appealed.

1917. Feb. 20, 22. *Sir Gordon Hewart, S.-G.*, and *T. Mathew*, for the appellant. Enemy property in transit, if transferred when war is imminent, is deemed in prize proceedings to remain the property of the transferor: Story on Prize Courts (Pratt's edition, 1854), p. 64; *The Vrow Margaretha* (2); *The Baltica*. (3) *The Southfield* (1) limits the rule to cases in which the captor can show that the transfer was made in contemplation of war and with the object of avoiding capture. If necessary, the appellant contends that that limitation is not in accordance with the authorities. But whether the rule is so limited or not, it applies to the facts of the present case. There was no proof of the alleged contract of July 13, 1914, and the judge rightly held that the transfer was made in contemplation of hostilities and to avoid capture. The fact that

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(1) (1915); see note, p. 390, post.

(3) (1857) 11 Moo. P. C. 141;

(2) (1799) 1 C. Rob. 336; 1 Eng. 2 Eng. P. C. 628.

P. C. 149.

J. C. the captors were not the belligerents with whom hostilities were
 1917 contemplated but allied belligerents is not material, since the
 THE DAKSA. transfer is to be regarded as nugatory. The identity of the rights
 ——— of allied belligerents appears from *The Panariellos*. (1)

Leck, K.C., and *Raeburn*, for the respondents. There is no ground for finding that the transfer was made in contemplation of war with any belligerent. At the date of the contract, July 13, 1914, war was not imminent. The respondents acted in the ordinary course of business; they would not have been justified in refusing to take up the documents because there was an apprehension of war: *Mitsui & Co. v. Watts, Watts & Co.* (2) The absence of the contract is reasonably accounted for by the evidence; the invoice shows that it was upon c.i.f. terms. Proof of a pre-existing contract discharges the onus upon the transferee to show that the motive was not to defraud captors: *The Vrow Margaretha* (3); *The Jan Frederick*. (4) The test being the motive of the transfer, the transfer is only to be deemed void as against the belligerent intended to be defrauded. The view of the President in *The Southfield* (5) was in accordance with the authorities.

Sir Gordon Hewart, S.-G., in reply. The transfer being made when war was imminent, the onus was upon the respondent to produce all relevant documents to establish the bona fide character of the transfer: *The Ernst Merck*. (6) It makes no difference that the captors were British; the test is whether the transfer defeats the rights of those who were imminent belligerents when it was made: *The Tommi*. (7)

March 22. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. Their Lordships are of opinion that, in view of the course taken both here and below, the parties to this appeal must be deemed to have made all such admissions of fact as were necessary to reduce the issue to one single question, namely, Was the transfer of August 1, 1914, to the respondents

(1) (1915) 31 Times L. R. 326.

(5) See note, p. 390, post.

(2) [1916] 2 K. B. 826.

(6) (1854) Spinks, 98, 103; 2

(3) 1 C. Rob. 336.

Eng. P. C. 338, 341.

(4) (1804) 5 C. Rob. 127; 1 Eng.
 P. C. 434.

(7) (1914) 1 Br. & Col. P. C. 16,
 24.

by the German sellers made under such circumstances as to entitle the captors to treat the barley transferred as retaining, notwithstanding the transfer, the character of enemy property at the date of its seizure as prize ?

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The principles of prize law upon which the answer to this question depends may, so far as material, be summarized as follows: (1.) Where a transfer of goods at sea is induced by apprehension on the part of the transferor of the outbreak of hostilities between the State to which he owes allegiance and another State, such transfer is deemed to be in fraud of the belligerent rights of the latter State, and should such hostilities subsequently arise, and the goods be seized as prize, the transferee cannot (at any rate if he were aware of the apprehension which induced the transfer) set up his own title in order to show that the goods had at the date of seizure lost their enemy character. (2.) If at the date of the transfer the circumstances were such as to give rise to a general apprehension of war, the onus is on the transferee to prove the complete innocence of the transaction. It will not be enough to prove his own innocence. He must prove also that the contract was not induced by apprehension of war on the part of the transferor. (3.) The transferee may discharge this onus by showing that the transfer was pursuant to a contract made at a time when no such hostilities were apprehended.

In the present case the respondents set up that the transfer of August 1, 1914, was made pursuant to a contract dated July 13, 1914. This may very probably have been the case, but it can hardly be said to have been proved ; for the contract of July 13, 1914, was not produced, nor is there any satisfactory evidence as to its terms. Their Lordships prefer to base their advice to His Majesty upon another ground.

The learned judge in the Court below held that there was at the date of the transfer no such general apprehension of hostilities between this country and Germany as to throw upon the transferee the onus of proving that the transfer was not in fraud of our belligerent rights. This was in accordance with the view expressed by the President in the case of *The Southfield* (1), and their Lordships are not prepared to differ from the learned judge upon what is in reality a finding of fact. The only question, therefore, is whether

(1) See note, p. 390, post.

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the British captors are, because war between France and Germany was at the date of transfer undoubtedly generally apprehended and subsequently broke out, in a better position than they could otherwise have been. In their Lordships' opinion they are not. A transfer induced by apprehension of hostilities is not void. It merely cannot be set up against those in fraud of whose rights it is deemed to have been made. Here there was no transfer which can be deemed to be in fraud of the rights of British captors, because there is nothing to show and nothing to raise any presumption that the transferor was induced to make the transfer by apprehension of war between Germany and the United Kingdom. Their Lordships agree in this respect with the judgment of the Court below and with the decision of the President in the case of *The Southfield* already referred to.

Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Lowless & Co.*

Note.

THE SOUTHFIELD.

ADMIRALTY DIVISION (IN PRIZE), July 5, 15, 1915.

SUIT for the condemnation as prize of barley forming part of the cargo of the British steamship *Southfield*. The facts appear from the judgment.

Maurice Hill, K.C., and *Balloch*, for the Crown.

Dumas, for the claimants.

THE PRESIDENT (SIR SAMUEL EVANS). The questions arising for decision depend upon the effect of the intervention of a state of war upon the rights of capture of a belligerent in respect of goods sold by an enemy to a neutral while the goods and the ship in which they are laden are in transitu.

The goods consisted of quantities of barley shipped before the war at a Russian port upon a British ship, and consigned to a German port. During the voyage the goods were sold by enemy merchants to neutral merchants, namely, two Dutch merchants, Heukers and Barghoorn, carrying on business at Groningen. The transactions relating to the sale to Heukers fell within the period from July 20 to July 28, 1914,

and those relating to the sale to Barghoorn within the last week in July, 1914. Apart from any question depending upon the intervention of war, it is not disputed that the property in the goods had passed to the neutral purchasers before the capture.

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The contention of the Crown was that when war was declared between this country and Germany on August 4, 1914, the goods, which were still in transitu, became subject to capture by the Crown, and were confiscable at the time of the capture and seizure on August 8, notwithstanding the prior sales to the neutrals, on the ground that at the time of such sales war was imminent, or in contemplation of the enemy vendors.

It is important to examine closely the principle which governs the right of capture of goods transferred in transitu, and to ascertain accurately its limits, as it is sometimes apt to be loosely stated.

In order to deduce the rule it will be sufficient, I think, to refer to two leading cases, and to one authorized text-book. I take them in order of date. [The learned President quoted from the judgment of Lord Stowell in *The Vrow Margaretha* (1), from Story on Prize Courts, Pratt's edition, pp. 64, 65, and from the judgment of the Judicial Committee delivered by Lord Kingsdown, then Mr. Pemberton Leigh, in *The Baltica* (2), and continued as follows:]

It might be argued that according to these authorities transfers in transitu are invalid against belligerent captors upon the intervention of war unless there is actual delivery before capture; or, in other words, that if war has intervened no transfer by documents alone can defeat the right of capture. But, in my opinion, that proposition is too wide, and is not an accurate delimitation of the true rule. In the passages cited Lord Stowell speaks of "a state of war existing or imminent"; Story J. of "a state of peace, without contemplation of war," and of "a state of war existing or imminent, and impending danger of war"; and Lord Kingsdown of "war, either actual or imminent," of "war unexpectedly breaking out" (contrasting it with "a time of peace, without prospect of war"), and of "transactions during war or in contemplation of war."

It is important to note the reasons for the rule, which are elaborated by Lord Kingsdown thus: "Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be in transitu till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to

(1) 1 C. Rob. 336, 337; 1 Eng. P. C. 149, 151.

(2) 11 Moo. P. C. 141, 146
2 Eng. P. C. 628 631.

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the owner." In my view the element that the vendor contemplated war, and had the design to make the transfer in order to secure himself and to attempt to defeat the rights of belligerent captors, is necessarily involved in the rule which invalidates such transfers. Sales of goods upon ships afloat are now of such common occurrence in commerce that it would be too hard a rule to treat such transfers as invalid unless such an element existed.

I have been considering the rule in its application to the sale or transfer of goods, but it is well to note that special and highly artificial rules as to the transfer of vessels during or preceding a state of war are now laid down in the Declaration of London of 1909—as agreed to by the representatives of the Powers, and as applied by the Orders in Council in this country. But these do not apply to goods or merchandise.

As to the facts in these two cases, it is abundantly clear that the neutral purchasers acted with complete bona fides throughout the respective transactions. They paid for the goods, and resold them to neutral customers of their own before war was declared, and I am satisfied that whilst the negotiations were proceeding they never contemplated the outbreak of hostilities between this country and Germany. This would not necessarily conclude the matter. But I am also satisfied that the vendors did not have the war between Germany and this country (to which the ship carrying the goods belonged) in contemplation when they sold the goods. They acted in good faith just as much as the purchasers did. The imminence of war between Germany and Russia has no materiality in considering these cases.

In the light of after-events, the war between this country and Germany may be spoken of as having been imminent, regarded from the point of view of time, in the last two weeks of July; but there is no evidence that it was regarded as imminent in its proper meaning of "threatening or about to occur" by them at that time; not only so, but I find, after investigation in various directions, and on grounds which I deem satisfactory, that it was not in fact so regarded by them. What the hidden anticipation of the Government of the German Empire may have been upon the subject it is not for me to speculate; but I may express my humble opinion that our intervention in the war upon the invasion of Belgium in defence of treaty obligations against the breach of such obligations by the invaders was a complete surprise even to their own Government.

On the grounds that the German vendors had no thought of the imminence of war between Germany and this country, and did not have such a war in contemplation at any time while the transactions of sale were taking place, or before they were completed, I hold that the sales to the two Dutch merchants were valid, and that the goods were not confiscable.

I, therefore, decree the release to them respectively of the net proceeds of the sale of their respective goods which are now in Court.

Solicitor for the Crown : *The Treasury Solicitor.*

Solicitors for claimants : *Thomas Cooper & Co.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR NEW ZEALAND APPELLANT ;

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AND

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March 27.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Will—Gift—Charity—Construction—Uncertainty—“Benevolent.”

A testator domiciled in New Zealand provided by his will that a fund should be held in trust for such “charitable benevolent religious and educational institutions societies associations and objects” as his trustees should select. In an investment clause the will referred to “any . . . institution commercial municipal religious charitable educational or otherwise” ;—

Held, that the gift must be construed as though the word “and” were “or,” and that, having regard to the investment clause, it could not be read as though the word “charitable” governed each of the three following words ; that the gift accordingly failed for uncertainty, a gift to “benevolent objects,” whether made in England or New Zealand, not being a good charitable gift.

APPEAL from a judgment of the Court of Appeal of New Zealand (September 27, 1915).

The appeal related to the will, dated September 12, 1914, of a testator who was domiciled in New Zealand, the will having been there made and proved. The trustees, by originating summons in the Supreme Court, asked for the determination of the question whether a gift, contained in the will, of the testator’s residuary estate was valid. The terms of the will, so far as material, appear from the judgment of their Lordships.

The Court of Appeal, to which the summons was transferred, held by a majority (Stout C.J. dissenting) that the gift was invalid. The case is reported at [1916] N. Z. L. R. 83.

The Attorney-General appealed.

1917. March 23. *Romer, K.C.*, and *Austen-Cartmell*, for the appellant. A benignant construction must be given to a gift intended for charity, so as if possible to render it effectual : *Bruce*

* *Present* : LORD BUCKMASTER, LORD PARKER OF WADDINGTON, and SIR WALTER PHILLIMORE, BART.

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v. *Presbytery of Deer* (1); *Weir v. Crum-Brown*. (2) It is conceded that upon the authorities a gift to "benevolent" purposes is in general not a good charitable gift: *Morice v. Bishop of Durham* (3); *Williams v. Kershaw* (4); *In re Jarman's Estate*. (5) Here, however, the gift should be construed as though the word "charitable" governed each of the three words which follow it. The effect is to limit the "benevolent" purposes to such as are charitable. This is a possible construction: *Cobb v. Cobb's Trustees* (6); it should be adopted under the benignant construction principle. Further, the meaning of a word must be "judged according to the society itself in which you find the word": per Lord Chelmsford in *Whicker v. Hume*. (7) Here "benevolent" is used in conjunction with words each of which would constitute a good charitable gift: *Income Tax Commissioners v. Pemsel*. (8) In *Morice v. Bishop of Durham* (9) the word "charitable" was nowhere used in the will; in *Williams v. Kershaw* (4) the word "benevolent" came first. Lastly, regard must be had to the fact that the testator was domiciled in New Zealand and the will there made. The expression "benevolent institutions" has been judicially held in New Zealand to have there acquired a meaning equivalent to "charitable institutions," the decision being only a few months prior to the date of the will: *Clarke v. Attorney-General*. (10) [Reference was also made to *In re Carter* (11) and *Moule v. Attorney-General*. (12)] In construing the clause, "benevolent" must be given the same meaning when applied to "societies, associations and objects" as it has in New Zealand when applied to "institutions."

Their Lordships desired to hear the respondents' counsel only as to whether the gift could be construed as though the benevolent purposes were limited to such as were charitable.

Clauson, K.C., and *Northcote*, for the respondents (next of kin). The construction suggested would not be in accordance with the

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| (1) (1867) L. R. 1 H. L. (Sc.) 96. | (6) (1894) 21 R. 638. |
| (2) [1908] A. C. 162, 167. | (7) (1858) 7 H. L. C. 124, 154. |
| (3) (1804) 9 Ves. 399, 405; | (8) [1891] A. C. 531, 583. |
| (1805) 10 Ves. 522, 537. | (9) 10 Ves. 522. |
| (4) (1835) 5 Cl. & F. 111. | (10) (1914) 33 N. Z. L. R. 963. |
| (5) (1878) 8 Ch. D. 584. | (11) (1897) 16 N. Z. L. R. 431. |
| (12) (1894) 20 Vict. L. R. 314. | |

grammatical meaning of the words used. Further, the investment clause shows that the testator attributed a separate meaning to the words "charitable," "religious," and "educational." The words must be read disjunctively.

[They were stopped.]

P. Wheeler, for the respondents (trustees).

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March 27. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The difficulty in this case lies in determining the exact values to be given to a series of words which follow each other in the bequest of the testator's residuary estate.

The appellant contends that these words constitute a valid charitable gift, and, as representing the public, the Attorney-General for the Dominion of New Zealand has brought this appeal from the judgment of the Court of Appeal of New Zealand, where by a majority of four judges to one it was decided that the gift was void and that the residue passed to the next of kin, who are represented by the third and fourth respondents.

The will containing the bequest, dated September 12, 1914, is that of Edward William Knowles, who died on April 23, 1915, domiciled at Napier in the said Dominion; by its terms the first three respondents were appointed executors and trustees, and by them the will was duly proved on May 13, 1915. The material part of the clause in question is in these words: "I direct and declare that the residue of the residuary trust funds (into which shall fall all bequests and legacies that may have lapsed) shall be held by my trustees in trust for such charitable benevolent religious and educational institutions societies associations and objects as they in their uncontrolled discretion shall select And I leave it entirely to the discretion of my trustees to decide upon the amounts to be given and paid to any such institutions societies associations and objects and also at their discretion to decide whether to make periodical payments or one single payment to any such institutions societies associations or objects."

It is obvious that the real obstacle that lies in the appellant's path is due to the word "benevolent." In accordance with a well-established series of authorities, beginning at least as early as *James v. Allen* (1), a gift for benevolent purposes is bad, because such pur-

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poses go beyond the legal definition of charities—a word which, in the construction of wills, has always possessed a limited and technical meaning. It is far too late to question the soundness of these authorities at the present day. It may well be that in the minds of people unversed in the subtlety of legal phrases “benevolent” and “charitable” are equivalent terms. But in the Courts the meaning of “charitable” has been influenced by the preamble to the statute 43 Eliz. c. 4, and charitable purposes have been regarded as those which that statute enumerates, or which by analogy are deemed within its spirit and intendment: see *Morice v. Bishop of Durham*. (1) From this it follows that a gift for charitable or benevolent purposes is void for uncertainty because it is impossible to divide the gift between the two objects, or to determine to which it should be given, and consequently the good cannot be separated from the bad, and the gift fails: see *In re Jarman's Estate* (2) and *Ellis v. Selby*. (3) If, therefore, the words of the gift in the present case are to be read disjunctively, and the word “benevolent” in New Zealand has, for legal purposes, the same meaning as that which it possesses here, the gift in the present instance would be bad. But the appellant contends that neither of these conditions is involved in the true interpretation of the words. He says, first, that the word “charitable” governs or at least explains, all the words that follow, and that, as religious and educational purposes are proper subjects of charitable bequests, the introduction of the words “religious and educational” shows that all the words following “charitable” are covered by its mantle, and that, consequently, “benevolent” objects must be read as though it meant such benevolent objects as are in their nature the proper subject of a charitable gift. This argument derives some force from the fact that there is no need for defining two classes of charities, such as religious and educational, when they are all included in the first word of the bequest. But the terms of the investment clause in the will really destroy the effect of this contention, for there the testator directs his moneys to be invested by depositing them “with any firm bank company or corporation or public body or institution commercial municipal religious charitable educational or otherwise”; and in their Lordships’ opinion this shows that the

(1) 9 Ves. 399, 405.

(2) 8 Ch. D. 584.

(3) (1836) 1 My. & Cr. 286.

meaning of the word "charitable" in the testator's mind was something that did not embrace religious or educational purposes, and that it ought rather to be regarded as eleemosynary, an interpretation which at once prevents tautology and gives a sensible meaning to each of the words.

So construed, however, the gift must fail, subject to the appellant's argument as to the meaning in New Zealand of the word "benevolent," for it is, in their Lordships' opinion, impossible to use the word "and" as a link intended to join all the words together and make the gift available only for such institutions or objects as satisfied each one of the conditions represented by each of the separate words. Apart from the fact that such a restriction would all but render the gift inoperative, it is plain from the use of the word "and" in the phrase "institutions societies associations and objects," which occurs twice in immediate succession to the words in question, that "and" must be regarded as "or." In the case of *Williams v. Kershaw* (1), where a gift to "benevolent charitable and religious purposes" was held bad by Lord Cottenham, the same principle of construction must have been applied, and it is, in their Lordships' opinion, impossible to distinguish the principle upon which that case was decided from the principle that ought to govern the present dispute.

There remains the consideration of the true meaning to be attached in this will to the word "benevolent," owing to the fact that it is used in a New Zealand will by a testator having a New Zealand domicile. It is, of course, quite possible that an English word might be used in New Zealand with a meaning different from that which it possesses here, and it may well be that "benevolent institutions and organizations" are, for the reasons pointed out by Stout C.J., charitable institutions in New Zealand according to the strict meaning of the phrase. Indeed, it seems so to have been regarded in the case of *Clarke v. Attorney-General* (2) and also in the State of Victoria in *Moule v. Attorney-General*. (3) But, even upon this assumption, the appellant's difficulties are not removed, for this reasoning would not endow the word "benevolent" with the same signification, when it is—as it must be in the present will—attached to the word

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(1) 4 Cl. & F. 111.

(2) 33 N. Z. L. R. 936.

(3) 20 Vict. L. R. 314.

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“objects,” and their Lordships cannot accept the appellant’s argument that if benevolent institutions and benevolent associations in New Zealand are properly regarded as charitable this involves the conclusion that benevolent objects, where the adjective has no such local limitation of meaning, are necessarily charitable also.

Their Lordships consequently are of opinion that the judgment of the Court of Appeal was correct, and that this appeal should be dismissed.

The trustees will have their costs as between solicitor and client out of the estate. As to the costs of the real litigant parties, their Lordships think that in the circumstances of this case the Attorney-General ought not to pay the costs of this appeal, but, on the other hand, they do not think that he ought to receive his costs out of the estate. As to the other respondents, it is possible that it will make no difference in the ultimate incidence of the expense whether their costs are included in the order or no ; but it may simplify matters of administration if a formal order be made that their costs as between solicitor and client should come out of the estate, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Mackrell, Maton, Godlee & Quincey.*

Solicitors for respondents : *Murray, Hutchins, Stirling & Co. ; Williamson, Hill & Co.*

[PRIVY COUNCIL.]

MUNICIPAL CORPORATION OF THE TOWNSHIP OF CORNWALL.	} APPELLANTS ;
AND	
OTTAWA AND NEW YORK RAILWAY COMPANY AND OTHERS	} RESPONDENTS.

J. C.*

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May 1.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada (Ontario)—Municipal Taxation—Assessment—Railway Bridge—
“Railway lands”—Assessment Act (R. S. Ont., 1914, c. 195), s. 47,
sub-s. 3.*

The Assessment Act (R. S. Ont., 1914, c. 195), which provides for the assessment of real property in Ontario for municipal taxation, by s. 47, sub-s. 3, exempts from assessment structures and other property upon “railway lands,” and used exclusively for railway purposes, or incidental thereto, except stations and certain other buildings :—

Held, that the words “railway lands” included any land lawfully occupied and used, and had no reference to the title under which the land was held.

APPEAL by special leave from a judgment of the Supreme Court of Canada (February 14, 1916) affirming the judgment of the Appellate Division of the Supreme Court of Ontario (April 26, 1915).

The respondents were three railway companies which were the owners and lessees of an international railway bridge across the river St. Lawrence ; they used the bridge exclusively for the purpose of railway traffic. The Canadian portion of the bridge was situated in the township of Cornwall. The bridge is described in the judgment of their Lordships. The soil of the bed of the river and of Cornwall Island, upon which the piers and abutments rested, were vested in the Crown in the right of the Province.

The appellants in the year 1914 assessed the Canadian portion of the bridge for municipal taxation under the Assessment Act (R. S. Ont., 1914, c. 195) at 300,000 dollars, and that assessment was confirmed by an order made by the Ontario Railway and Municipal

* *Present* : LORD BUCKMASTER, LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, and SIR WALTER PHILLIMORE, BART.

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Board. The order confirming the assessment was set aside by the Appellate Division, which declared that the bridge was not liable to assessment. The judgments are reported at 34 Ont. L. R. 55.

The Supreme Court of Canada, by a majority, affirmed the decision of the Appellate Division. Fitzpatrick C.J. and Idington J. dissented upon a question of procedure not raised upon the present appeal. The judgments are reported at 52 Can. S. C. R. 466.

1917. Feb. 28 ; March 1. *Clauson, K.C., Barrington-Ward, and Gogo*, for the appellants. The bridge is assessable under the general provision in s. 5 of the Assessment Act (R. S. Ont., 1914, c. 195) and by virtue of s. 47, sub-s. 2 (d), of that Act. The river St. Lawrence is not a "highway, road or street" within the meaning of s. 47, sub-s. 2 (c), and is accordingly not exempt thereby. The Act contains no definition of "highway," but the appellants' contention is supported by the inclusion of the words "or water" in s. 2 (h) (5.) and by the definition in s. 2 (e) of the Municipal Act (R. S. Ont., 1914, c. 192). The bridge is not a structure upon "railway lands" so as to be excluded from assessment by s. 47, sub-s. 3. It is constructed upon Crown lands of which the respondents are merely licensees. The words "railway lands" are used in contradistinction from "public land" used in s. 47, sub-s. 1 ; if they mean any land used for railway purposes the words which follow them are not necessary.

P. O. Lawrence, K.C., W. L. Scott, and Hon. M. Macnaghten, for the respondents. It has been the settled policy of the Legislature of the Province, as appears from the Assessment Acts of 1850, 1868, and 1904, to exempt from assessment all railway superstructures, including bridges, and to confine the assessment to land and buildings, valued according to the average value of land and buildings in the locality. With the exception of certain structures in the case of a railway running along a highway this policy has never been departed from. A bridge is not assessable as part of the "roadway" under s. 47, sub-s. 2 (a) ; clause (d) of that sub-section applies only to matters not dealt with in clauses (a), (b), and (c). In any case, the exemption in s. 47, sub-s. 2 (c), of bridges over a highway applies, as the St. Lawrence is navigable and, therefore, a highway. Further, the bridge is excluded from assessment by s. 47, sub-s. 3 ; the words

“ railway lands ” in that sub-section included all land occupied and used for the purpose of the railway. That sub-section extends the exemption given by s. 44, sub-s. 2, of the Act of 1904 (4 Edw. 7, c. 23). [*Corporation of St. John's v. Central Vermont Ry. Co.* (1) was referred to.]

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E. N. Armour, for the Attorney-General of Ontario, intervener.

Clauson, K.C., in reply, referred to *International Bridge Co. v. Village of Bridgeburg.* (2)

1917. May 1. The judgment of their Lordships was delivered by

LORD PARMOOR. This is an appeal from a judgment of the Supreme Court of Canada confirming a judgment of the Supreme Court of Ontario. Special leave to appeal was granted by His Majesty in Council on August 18, 1916, the appellants undertaking not to raise on appeal the question that the Railway and Municipal Board of Ontario had no jurisdiction to hear the appeal direct from the Court of Revision, or that the Appellate Division of the Supreme Court of Ontario or the Supreme Court of Canada had no jurisdiction to entertain the appeals to those Courts. The question which was left open for the appellants to raise is whether a railway bridge, which is described in the assessment as an international bridge between Canada and the United States of America, is assessable to municipal taxation so far as it is situated within the Canadian boundary. The respondents raised in their case the further question whether the appeal is competent, having regard to a prohibition contained in a Provincial statute (3), but their Lordships are of opinion that the Provincial statute does not affect the jurisdiction of the Privy Council to entertain an appeal from the Supreme Court of Canada.

The northern portion of the bridge crosses the north channel of the St. Lawrence by a cantilever span, and is supported on two abutments and six piers. The abutments are on the land to the

(1) (1889) 14 App. Cas. 590.

(2) (1906) 12 Ont. L. R. 314.

(3) R. S. Ont., 1914, c. 186, s. 48 (6.), as amended by 6 Geo. 5 (Ont.), c. 24, s. 26. The provisions in terms refer to an appeal from

the Appellate Division, and not to one from the Supreme Court. The respondents in argument raised but abandoned the contention that the appeal was not competent.

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north of the Cornwall Canal and on Cornwall Island ; two of the piers are erected in the canal, one on the strip of land between the canal and the north channel of the St. Lawrence, two in the north channel, and one on Cornwall Island. The southern portion of the bridge crosses the south channel of the St. Lawrence. It rests upon two abutments, one on Cornwall Island and one on land within the territory of the United States and upon four piers, one erected on the island and the other three south of the international boundary. No question arises on details or on cost of construction, and the position of the bridge is sufficiently shown on a map attached to the case of the appellants.

The Assessment Act (R. S. Ont., 1914, c. 195) contains the provisions on which the appellants and respondents respectively rely in support of their contentions. Sect. 2 of the Act defines "land," "real property," and "real estate" as including, *inter alia*, all structures erected or placed upon, in, over, under, or affixed to land and all structures erected or placed upon, in, over, under, or affixed to any highway or other public communication or water, but not the rolling stock of any railway, electric railway, tramway, or street railway. The distinction between structures placed over or affixed to land and structures placed over or affixed to any highway, canal, or other public communication or water becomes important in considering the assessment of railways under s. 47 of the Act. Subject to certain exemptions, which are not material to the present case, s. 5 of the Act renders all real property in Ontario liable to taxation. The structure of the bridge would therefore, apart from the special provisions as to railways contained in the Act, appear to be liable to assessment. Where an international bridge is liable to assessment the method of valuation is specified in s. 46.

Sect. 47 is the section under which steam railways are assessed to municipal taxation, and the present appeal depends on the construction of this section. It enacts that every steam railway company shall annually transmit to the clerk of every municipality in which any part of the roadway or other real property of the company is situate a statement under four heads. These four heads designate what property of a steam railway is liable to assessment. This statement is communicated to the assessor, who is directed to make the assessment on the prescribed basis. There is a third sub-section

which exempts from assessment certain structures and other property on railway lands and used exclusively for railway purposes or incidental thereto, notwithstanding anything contained in the Act. It will be convenient to postpone the consideration of this subsection to a later stage.

Under clause (a) of sub-s. 1 the railway company is required to state the quantity of land occupied by the roadway, and the actual value thereof (according to the average value of land in the locality), as rated in the assessment roll of the previous year. There is no difficulty in determining the nature of this statement. It would comprise the superficial area occupied by the roadway between the relevant termini within the particular municipality and a valuation based on the assessment roll of the previous year. The corresponding direction to the assessor is quite explicit. He is to assess the quantity of roadway or right of way returned in the statement at the actual value thereof according to the average value of land in the locality; but not including structures, sub-structures, and super-structures, rails, ties, poles, and other property thereon. Land in the locality may be agricultural land or land of special value for building or commercial purposes. The effect is that the quantity of land occupied by the roadway is assessed at the same average land value as if such land had not been taken for the purpose of railway construction, and that a structure such as the bridge in question would not be included in the valuation.

Under clause (b) of sub-s. 1 the statement is required to show the vacant land not in actual use by the company and the value thereof. This return and the method of assessment which the assessor is directed to follow cannot directly affect the present appeal, but the effect is that vacant land, not in actual use by a railway company, contributes to municipal taxation on the same basis as other vacant lands within the municipality.

Under clause (c) of sub-s. 1 the statement is required to show the quantity of land occupied by the railway and being part of the highway, street, road, or other public land (but not being a highway, street, or road merely crossed by the line of railway) and the assessable value as thereafter mentioned of all the property belonging to or used by the company upon, in, over, under, or affixed to the same. The quantity of land to be included in the return of the

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railway company would not comprise the land under the bridge crossing the two channels of the St. Lawrence. These channels are merely crossed by the line of railway. If, therefore, the channels are to be regarded as a highway, street, road, or other public land, they are excluded under the terms of the exception from the quantity of land which the company are required to return. There is no return of the assessable value of a structure not over or affixed to the land comprised within the statement. It may be noticed that under clause (a) the roadway occupied by the company has been returned and assessed. The statement of the quantity of land under clause (c) is not for the purpose of an overlapping assessment, and the assessable value to which this statement refers is not the assessable value of land as such, but of property belonging to or used by the company upon, in, over, under, or affixed to any highway, street, road, or other public land.

The direction to the assessor under clause (c) of sub-s. 2 is clearly not applicable to the assessment of the bridge in question. The words, "not being a highway, street, or road merely crossed by the line of railway" are repeated, and there is a direction that the structures to be assessed shall not include any bridges in, over, under, or forming part of any highway.

Under clause (d) of sub-s. 1 the railway company are required to make a return of real property, other than aforesaid, in actual use and occupation by the company and its assessable value as thereafter mentioned. The assessor, under clause (d) of sub-s. 2, is directed to assess the real property not designated in clauses (a), (b), and (c) of this sub-section in actual use and occupation by the company at its actual cash value, as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises. There is no doubt that the bridge is in actual use and occupation by the company. Its structure is clearly not designated in clauses (a) or (b). The only structures designated in clause (c) are structures over or affixed to any highway, road, or street.

In the opinion of their Lordships it is doubtful whether the word "highway," in association with the words "road or street," would include the two channels of the St. Lawrence crossed by the bridge, but it is not necessary to decide this question, since, in their opinion

the structure of the bridge is excluded from assessability under the terms of sub-s. 3.

Sub-s. 3 enacts that, notwithstanding anything in the Act contained, the structures, sub-structures, super-structures, rails, ties, poles, and pins or other property on railway lands, and used exclusively for railway purposes or incidental thereto (except stations, freight-sheds, offices, power-houses, elevators, hotels, round-houses, and machines, repair and other shops), shall not be assessed. This differentiation between railway structures and buildings used in connection with railway business is familiar in English law. The bridge does not come within the category of any of the exempted properties, and it is used exclusively for railway purposes or incidental thereto. The only question which arises for decision is whether it is "on railway lands."

In the opinion of their Lordships the words "on railway lands" have no reference to the title by which lands are held. It does not make any difference for rating purposes by what title lands are held so long as they are in the lawful actual use and occupation of the person or company on whom a rate is sought to be levied.

The bridge is affixed to the land on which the abutments and piers rest. Both the abutments and five out of the seven piers within the Canadian frontier are erected on land outside the channels of the St. Lawrence and capable of being purchased and acquired by the railway company under ordinary statutory procedure. There is no reason to assume that they are not lands in the lawful use and occupation of the railway company, and therefore in the ordinary sense railway lands. It is not necessary to inquire whether any special permission was required in reference to the use and occupation of land in the south channel of the St. Lawrence, nor are any such questions raised, since the only effect of proving that such use and occupation are not lawful could not be in favour of establishing a liability to assessment. In the opinion of their Lordships the bridge is affixed to lands in the lawful use and occupation of the railway company and is a structure on railway lands within the meaning of sub-s. 3. They agree in the view expressed by Meredith C.J.O., which is followed by Anglin and Davies JJ. (1): "The erection of the bridge having been authorised by the Parlia-

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ment of Canada, it must be assumed for the purposes of the case that it is a lawful structure, that the railway company is entitled to maintain it as it has been constructed, and that its occupation of the soil by the piers and by the superstructure, in so far as the latter occupies the land of the Crown, is a lawful occupation; and, that assumption being made, the bridge is, in my opinion, a structure on railway lands within the meaning of sub-s. 3."

In the opinion of their Lordships the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondents : *Blake & Redden.*

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[IN THE HOUSE OF LORDS.]

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BOWMAN AND OTHERS APPELLANTS;

AND

SECULAR SOCIETY, LIMITED RESPONDENTS.

Company—Objects—Legality—Anti-Christian Company—Blasphemy—Capacity to receive Gifts—Bequest to Company—Validity—Conclusiveness of Certificate of Incorporation as to Legality of Objects—Blasphemy Act, 1697 (9 & 10 Will. 3, c. 32 [9 Will. 3, c. 35, Rev. Stat.])—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 1.

The Secular Society, Limited, was registered as a company limited by guarantee under the Companies Acts, 1862 to 1893. The main object of the company, as stated in its memorandum of association, was "to promote . . . the principle that human conduct should be based upon natural knowledge, and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action":—

Held, assuming that this object involved a denial of Christianity, (1) that it was not criminal, inasmuch as the propagation of anti-Christian doctrines, apart from scurrility or profanity, did not constitute the offence of blasphemy; and (2) (by Lord Dunedin, Lord Parker of Waddington, Lord Sumner, and Lord Buckmaster; Lord Finlay L.C. dissenting) that it was not illegal in the sense of rendering the company incapable in law of acquiring property by

* *Present* : LORD FINLAY L.C., LORD DUNEDIN, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD BUCKMASTER.

gift, and that a bequest "upon trust for the Secular Society Limited" was valid. H. L. (E.)

The principle of *Reg. v. Ramsay and Foote* (1883) 15 Cox, C. C. 231; Cab. & E. 126 applied.

Briggs v. Hartley (1850) 19 L. J. (Ch.) 416 and *Cowan v. Milbourn* (1867) L. R. 2 Ex. 230 overruled.

The conclusiveness of the certificate of incorporation upon the legality of the objects of the company considered.

Decision of the Court of Appeal [1915] 2 Ch. 447 affirmed.

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APPEAL from an order of the Court of Appeal affirming an order of Joyce J. (1)

Charles Bowman, by his will dated September 14, 1905, devised and bequeathed his residuary real and personal estate to his trustees upon trust after the death of his wife for sale and conversion, and to stand possessed of the proceeds, subject to certain annuities, "upon trust for the Secular Society Limited of 2 Newcastle Street Farringdon Street London" (the respondents).

The testator made a codicil to his will not material to the purposes of the present appeal, and he died on April 21, 1908.

The testator's widow died on October 18, 1914.

On November 25, 1914, the respondent society took out an originating summons asking for payment over to them of the residue of the testator's estate and administration of the estate so far as necessary.

The appellants, the next of kin of the testator, disputed the validity of the residuary gift to the respondent society on the ground that the objects of the society were unlawful.

The respondent society was registered on May 27, 1898, as a company limited by guarantee under the Companies Acts, 1862 to 1893, with a memorandum and articles of association.

The objects of the society as stated in clause 3 of the memorandum of association were as follows:—

"(A) To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action.

"(B) To promote the utmost freedom of enquiry and the publication of its discoveries.

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“(C) To promote the secularisation of the State, so that religious tests and observances may be banished from the Legislature, and Executive, and the Judiciary.

“(D) To promote the abolition of all support, patronage, or favour by the State of any particular form or forms of religion.

“(E) To promote universal secular education, without any religious teachings, in public schools maintained in any way by municipal rates or imperial taxation.

“(F) To promote an alteration in the laws concerning religion, so that all forms of opinion may have the same legal rights of propaganda and endowment.

“(G) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens.

“(H) To promote the recognition of Sunday by the State as a purely civil institution for the benefit of the people, and the repeal of all Sabbatarian laws devised and operating in the interest of religious sects, religious observances, or religious ideas.

“(I) To purchase, lease, rent or build halls or other premises for the promotion of the above objects.

“(J) To employ lecturers, writers, organisers or other servants for the same end.

“(K) To publish books, pamphlets, or periodicals.

“(L) To assist by votes of money or otherwise other societies or associated persons or individuals who are specially promoting any of the above objects.

“(M) To have, hold, receive and retain any sums of money paid, given, devised or bequeathed by any person, and to employ the same for any of the purposes of the society.

“(N) To co-operate or communicate with any kindred society in any part of the world.

“(O) To do all such other lawful things as are conducive or incidental to the attainment of all or any of the above objects.”

At the hearing of the summons the appellants tendered certain evidence as to the course of business of the respondent society. Joyce J., however, rejected this evidence, and held that the legality of the society must be determined solely upon a consideration of its memorandum and articles of association ; and he held, further,

that there was nothing in either the memorandum or articles subversive of morality or contrary to law. He was therefore of opinion that the residuary gift was valid.

The Court of Appeal (Lord Cozens-Hardy M.R., Pickford L.J., and Warrington L.J.) affirmed the decision of the learned judge upon both points.

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Jan. 30 ; Feb. 1, 2, 5, 8. *G. J. Talbot, K.C.*, and *J. Arthur Price*, for the appellants. The question is whether the gift to the respondent society is a gift for an illegal purpose. In determining the legality of the objects of this society the Courts below held that they were bound to look only at the memorandum and articles of association and excluded evidence of the conduct of the society. It is submitted that that is wrong. The appellants are entitled to succeed on the memorandum alone, but they are further entitled to look at the memorandum in the light of the doings of the society. It is not really disputed that this society is actively engaged in propagating doctrines subversive of Christianity. But that its main object is the subversion of Christianity appears by implication from the memorandum itself : see particularly sub-clause (A) of clause 3. The appellants' case is that a society for the subversion of Christianity is illegal and is incapable of enforcing a bequest to it. The Court of Appeal, in upholding the bequest, have created an absolutely new precedent. Admittedly the whole tenor of authority is the other way. Their decision is not an interpretation but an alteration of the law. Christianity is and has always been regarded by the Courts of this country as the basis on which the whole of the English law, so far as it has an ethical side, rests, and any movement for the subversion of Christianity has always been held to be illegal. If so, when and how has the law been altered ? What is consistent or inconsistent with Christianity is a question on which opinion may differ from time to time, but that is a question of the application of the principle. Here the Court of Appeal have not applied the principle at all, but have revoked it and have usurped the province of the Legislature. In *Cowan v. Milbourn* (1) the refusal by the owner of the use of a room which had been hired for the delivery of lectures impeaching the character and teachings

(1) L. R. 2 Ex. 230.

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of Christ was held to be justified on the ground that the intended use was for an unlawful purpose, and Kelly C.B. there said that Christianity was part and parcel of the law of the land. Bramwell B. pointed out that a thing might be unlawful so as to prevent its being the foundation of any legal right though not punishable criminally. By the Toleration Act of 1688 (1 Will. & Mar. c. 18) dissenting Protestants were relieved from the penalties imposed by the Act of Uniformity and certain other Acts, but Papists and persons denying the doctrine of the Blessed Trinity were expressly excluded from the benefits of that Act. By the Blasphemy Act, 1697 (9 & 10 Will. 3, c. 32) (1), persons educated in the Christian religion who were convicted of denying the Trinity or the truth of Christianity were subjected to very heavy penalties and disabilities. That Act really recognizes the common law and imposes additional penalties to the common law offence of blasphemy. So far as appears, no indictment has ever been instituted under that Act. By 53 Geo. 3, c. 160, the Toleration Act of 1688 and the Blasphemy Act of 1697, so far as they related to persons impugning the doctrine of the Holy Trinity, were repealed and such persons were relieved from penalties. By the Roman Catholic Charities Act, 1832 (2 & 3 Will. 4, c. 115), Catholics, and by the Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), Jews, are now placed in the same position as Protestant nonconformists. But before the passing of the last-named Act a gift for the advancement of the Jewish religion was held by Lord Hardwicke to be illegal as being contrary to the Christian religion, which was part of the law of the land: *De Costa v. De Paz*. (2) Since the passing of 53 Geo. 3, c. 160, gifts for Unitarian objects have been held good: *Shrewsbury v. Hornby* (3); *In re Barnett*. (4) In *Shore v. Wilson* (5) the point did not directly arise, but that case, rightly read, shows that the toleration of Unitarians is based upon the implied effect of 53 Geo. 3, c. 160, which, while in terms relieving only from statutory penalties, impliedly relieves from all penalties and places Unitarians in the same position as other Protestant dissenters. But, except so

(1) Called in the Revised Statutes 9 Will. 3, c. 35.

(2) (1754) 2 Swanst. 487, note (a); Amb. 228.

(3) (1846) 5 Hare, 406.

(4) (1860) 29 L. J. (Ch.) 871.

(5) (1842) 9 Cl. & F. 355.

far as repealed by that Act, the Blasphemy Act still remains in force, and there is no such thing as an obsolete Act. It follows that a society, such as this is, for the subversion of all religion is an illegal association and is incapable of receiving bequests: see *Thompson v. Thompson* (1); *Thornton v. Howe* (2); *In re Bedford Charity*. (3) Offences against religion were originally within the exclusive jurisdiction of the Ecclesiastical Courts, to which every subject of the realm, unless expressly exempted, was amenable to the same extent as to the common law Courts. The status of ecclesiastical law is fully discussed in *Caudrey's Case*. (4) With regard to the jurisdiction as to heresy, the common law Courts regarded themselves as bound by the decisions of the Ecclesiastical Courts, and the heretic was burnt by virtue of the writ *De Haeretico Comburendo*, which was a common law writ: Hawkins, *Pleas of the Crown*, book 1, part 2, c. 26, tit. "Heresy," s. 10; Coke's *Institutes*, 3rd Part, c. 5; Fitzherbert's *Natura Brevium*, p. 269. See also Maitland's *Canon Law in the Church of England*, c. 6. By 29 Car. 2, c. 9, the writ *De Haeretico Comburendo* was abolished, but the Act contained a proviso expressly saving the jurisdiction of the Ecclesiastical Courts "in cases of atheism, blasphemy, heresy, or schism"; and see the Ecclesiastical Courts Act, 1813 (53 Geo. 3, c. 127), ss. 1, 2, 3, which abolished excommunication except in certain specified cases. Upon a review of the common law and the legislation recognizing and modifying it it is impossible to maintain that an attack upon Christianity is lawful. Blackstone (*Commentaries*, book 4, c. 4, s. iv.), in dealing with offences against religion, says that the fourth species of offences more immediately against God and religion is "that of blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. . . . These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment: for Christianity is part of the laws of England." The first recorded case of an indictment for blasphemy is *Rex v. Taylor* (5) in 1675, where Lord Hale held that blasphemy was indictable

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(1) (1844) 1 Coll. 381, 397.

(3) (1819) 2 Swanst. 470, 527.

(2) (1862) 31 Beav. 14, 20.

(4) (1591) 5 Rep. 1a, 8a.

(5) (1675) 1 Vent. 293.

H. L. (E.) at common law. Therefore in theory it has always been indictable. Since that date there have been several convictions for blasphemy :
 1917 *Rex v. Woolston* (1); *Rex v. Williams* (2); *Rex v. Mary Carlile* (3); *Rex v. Waddington* (4); *Reg. v. Hetherington*. (5) It is true that in most of these cases the attack on Christianity was accompanied by scurrility, but that was not the ground on which the Courts proceeded; they regarded Christianity as part of the law of England, and looked at the substance and not the form of the attack. In *Harrison v. Evans* (6) Lord Mansfield draws a distinction between the eternal principles of Christianity and mere nonconformity, and his judgment further shows that the Toleration Act does not merely exempt the dissenters' way of worship from particular penalties, but renders it innocent and lawful. In *Lawrence v. Smith* (7) and *Murray v. Benbow* (8) Lord Eldon recognized that Christianity was part of the law of the land, and held that any publication which contradicted or vilified the Scriptures was not entitled to the protection of the Court.

[LORD PARKER OF WADDINGTON referred to *Reg. v. Moxon*. (9)]

The only authority which is opposed to this view is Lord Coleridge's summing-up in *Reg. v. Ramsay and Foote*. (10) He says, first, that the dicta of the judges in old times cannot be supported at the present day, and, secondly, that those dicta are in harmony with the law as he laid it down. His summing-up is inconsistent with itself. He also relies on a passage from Starkie on Libel, which does not purport to be a statement of what the law is, but of what in Mr. Starkie's view the law ought to be. For the reasons

(1) (1729) Fitzg. 64; 2 Str. 834; 1 Barn. K. B. 162.

(2) (1797) 26 St. Tr. 653.

(3) (1819) 3 B. & Al. 167.

(4) (1822) 1 B. & C. 26.

(5) (1841) 5 Jur. 529; 4 St. Tr. (N.S.) 563.

(6) Feb. 3, 1767. The judgment of Lord Mansfield is to be found in "A Sketch of the History and Proceedings of the Delegates appointed to protect the Civil Rights of the Protestant Dissenters" (1813), p. 31; in the

appendix to Dr. Philip Furneaux's Letters to Mr. Justice Blackstone (2nd ed.); and in "Parliamentary History," vol. 16, pp. 315-327. The case is also referred to in 2 Burn's Eccl. Law, pp. 207-220, sub nom. *Evans v. Chamberlain of London*.

(7) (1822) Jac. 471.

(8) (1822) 4 St. Tr. (N.S.) 1409; Jac. 474, n.

(9) (1841) 4 St. Tr. (N.S.) 693.

(10) 15 Cox, C. C. 231; Cab. & E. 126.

stated by Sir James Fitzjames Stephen in an article in vol. 41 of the *Fortnightly Review*, p. 289 (March, 1884), which the appellants desire to adopt as part of their argument, Lord Coleridge's view of the law is erroneous : and see the same author's *History of the Criminal Law of England*, vol. 2, p. 474. This society, therefore, inasmuch as it is formed for the destruction of Christianity, is for a blasphemous object. Apart from the criminal aspect of the case, it is, and always has been, illegal to attack Christianity. At any rate, there is no trace of Lord Coleridge's doctrine having ever been applied to anything but the criminal prosecution. [With regard to the law relating to superstitious uses they referred to *Tyssen on Charitable Bequests*, c. 5; *Cary v. Abbot* (1); *Smart v. Prujean* (2); and *West v. Shuttleworth*. (3)]

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Tomlin, K.C., and *Hon. Malcolm Macnaghten*, for the respondents.

(1.) In these proceedings the question of the legality of the respondent company is not open. (2.) If a company has any legal object, then a gift to the company applicable to any of its purposes is not invalid. (3.) On the true construction of this memorandum of association sub-clause (A) of clause 3 does not necessarily involve any attack on or subversion of Christianity at all. (4.) There is no illegality in any sense of the term in a temperate discussion of the Christian religion. As to (1.), the respondents rely upon the terms of the registrar's certificate. This company was formed in 1898 under the Companies Act, 1862, and by ss. 18 and 192, since replaced by s. 1 of the Companies Act, 1900, which is made retrospective, the certificate of incorporation is conclusive evidence of the legality of the company. If this were a company for a wholly illegal object, it is not contended that there might not be proceedings by quo warranto or scire facias for avoiding the registration. But so long as the company is registered the certificate is conclusive that the company is associated for a lawful purpose: *Moosa Goolam Ariff v. Ebrahim Goolam Ariff* (4), a decision upon a similar provision in the Indian Companies Act. *British Association of Glass-Bottle Manufacturers v. Nettlefold* (5) turned upon the Trade Union Act, 1871, and is distinguishable. This, then, is a legal corporation and is

(1) (1802) 7 Ves. 490.

(3) (1835) 2 My. & K. 684, 697.

(2) (1801) 6 Ves. 560, 567.

(4) (1912) L. R. 39 Ind. Ap. 237.

(5) (1911) 27 Times L. R. 527.

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capable in law of receiving the bequest. The only right which the Court of Chancery has to withhold the payment of the money is because the gift is bad. In a claim by next of kin to money given to a legal corporation it is no answer to the company's right to say that some of its objects are illegal. If the gift is good it is not open to the Court to impose the terms upon which the company is to be paid. As to (2.), the existence of one illegal object does not make a gift to the company illegal where the gift is not fixed with a trust for the illegal purpose. Here the company has a number of legal objects, e.g. (D), (E), (F), (G). Suppose a company formed to carry on a shipping business between London and Havre and London and Hamburg, and war intervenes between the United Kingdom and Germany; and suppose coal is ordered by the company. Could the coal owner refuse to supply it on the ground that it might be used on a voyage from London to Hamburg? As to (3.), upon the construction of sub-clause (A) it contains nothing which is necessarily subversive of Christianity, and it is for those who impeach the gift to establish the illegality of the object. There is no declaration in the sub-clause contradictory of anything which can be regarded as fundamentally Christian; it is not anti-religious, but non-religious, and is nothing more than a statement of the Positivist position. *Pare v. Clegg* (1) is an analogous case. Moreover, object (A) must be read by the light of the other objects of the company, and the legality of those objects suggests a doubt whether object (A) is unlawful. As to (4.), it is not a criminal offence in this country temperately and in decent language to express opinions which are contrary to the Christian faith, nor is it illegal in the sense that a contract with a company for the promotion of such opinions cannot be enforced. In considering what the law is to-day some regard must be had to the history of the persecution or restraint of opinion in the past. The grounds of persecution have varied from time to time. They have been defined by Sir Frederick Pollock (Essays in Jurisprudence and Ethics, c. 6) as tribal, theological, political, and social. The persecution of the Christians by the Romans belonged to the tribal stage, the theory being that the harbouring of persons who offended the tribal gods was a source of danger to the tribe or city; but it was concerned with conduct

rather than with opinion. Then came the theological stage, which was based on the principle that the one true faith was in the custody of the Church, and that that way lay salvation. This is exemplified by the prosecutions for heresy. Then with the Reformation came the third stage, which was mainly political. Roman Catholics were prosecuted on the ground that they owed a double allegiance and Puritans because they were opposed to the monarchy. The last is the social stage, where the governing principle is a desire to prevent breaches of the peace. The age in which the penal statutes under consideration in this case were passed was an age in which the social and political theories had displaced the theological theory as the predominant motive of the Legislature. It is inaccurate to say that the Christian faith is part of the law of the land. All that is meant by that phrase is that one of the institutions of the State is a body established by law known as the Christian Church in England and that the constitution and polity of England is founded on the Christian religion. But Christianity is not part of the law of England in the sense that a denial of the truth of Christianity constitutes a legal offence. That would be giving to the common law Courts a wider jurisdiction than even the Ecclesiastical Courts professed to exercise. Their jurisdiction in that regard was confined to persons who were brought up as Christians and to cases of obstinate heresy. Contumeliously to attack Christianity has always been an offence at common law, but the view of what amounts to contumely varies from time to time. None of the cases cited by the appellants is free from the element of scurrility or contumely. *Woolston's Case* (1) is no exception. The Court there relied upon *Hall's Case* (2) and *Taylor's Case* (3), which were precedents of gross scurrility, and the dictum that it is an offence to deny the truth of Christianity is wrong. Upon the authorities there is no ground for saying that the common law treats as blasphemy a mere denial of the Christian faith. Scurrility is essential to the offence. The law is correctly stated by Lord Coleridge in *Reg. v. Ramsay and Foote* (4), which has since been followed by Phillimore J. in *Rex v. Boulter*. (5) Nor can

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(1) Fitzg. 64; 2 Str. 834;
1 Barn. K. B. 162.

(2) (1720-1) 1 Str. 416; 2 Str.
790.

(3) 1 Vent. 293.

(4) 15 Cox, C. C. 231; Cab. &

E. 126.

(5) (1908) 72 J. P. 188.

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the appellants derive any assistance from the Blasphemy Act. That statute recognizes that there was an offence of blasphemy at common law, but does not indicate what the offence was, and it creates a new offence for a special class of persons. Its object was primarily political, and it had nothing whatever to do with the common law : *Rex v. Richard Carlile* (1) ; Stephen's History of the Criminal Law, vol. 2, p. 473. As regards the Toleration Act and the Act 53 Geo. 3, c. 160, those Acts did not confer privileges on particular classes, but relieved certain classes of persons from certain statutory disabilities ; and in *Harrison v. Evans* (2) Lord Mansfield did not intend to suggest that the Toleration Act had any wider effect. Then, if a denial of Christianity is not of itself a criminal offence, is it unlawful, or what may be called undesirable, in the sense that no contract in respect of it will be enforced ? With the exception of *Cowan v. Milbourn* (3), which, it is submitted, is wrongly decided, there is no authority that a denial of Christianity is unlawful in the latter sense. So far as a thing is unlawful and not criminal it depends upon public policy, but what is included in public policy is a matter which varies with the circumstances of the age : *Evan-turel v. Evanturel*. (4) This is well illustrated by the cases on contracts in restraint of trade : *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (5) In determining the quality of the expression of certain opinions the Courts to-day might differ from the Courts of the time of Elizabeth, though the principle would be the same. [They also referred to *In re Michel's Trust* (6) with regard to the effect of the Religious Disabilities Act, 1846.]

G. J. Talbot, K.C., in reply. As regards the registrar's certificate, the respondents' contention lays an altogether unreasonable burden on the words of the Act. The appellants are not contending that the company ought not to exist, but merely that this bequest is for an illegal object. The observations of Lord Halsbury in *Daimler Co. v. Continental Tyre and Rubber Co.* (7) are in point. Then it is said that if the company has among its objects some legal and some illegal it must be assumed that a gift to the company will

(1) (1819) 3 B. & Al. 161, 166.

(2) See note (6), p. 412, ante.

(3) L. R. 2 Ex. 230.

(4) (1874) L. R. 6 P. C. 1, 29.

(5) [1894] A. C. 535, 564.

(6) (1860) 28 Beav. 39.

(7) [1916] 2 A. C. 307, 316.

be applied to the legal objects. The appellants dispute that proposition. If there are several considerations for a promise and one is unlawful, that vitiates the whole contract. If one of the objects of the company is unlawful, the addition of other innocent objects will not entitle the company to obtain the money and the gift will be avoided. That is conclusive and does not turn upon any question of onus, but for the purposes of the present case it is immaterial which is the true view. Sub-clause (A) is the primary object of the company, and if that is gone the whole substratum is gone: *In re German Date Coffee Co.* (1) The other objects (B) to (O) are ancillary to (A), and if they were worked for the advancement of Christianity the company would be wound up. Upon this point the Court of Appeal were in favour of the appellants. Then it is said that object (A) does not in fact involve the subversion of Christianity. It promotes the exclusion of all religion as an article of faith and as a guide to conduct, and the very name of the company supports the appellants' contention. See the definition of "Secular" and "Secularism" in the Oxford English Dictionary. This point also was decided by the Court of Appeal in favour of the appellants. Lastly, it is said that it is neither criminal nor illegal to attack Christianity apart from scurrility. As regards the criminal aspect, the form of indictment for blasphemous libel shows that the ground of the offence is not that the libel is scurrilous or leads to a breach of the peace, but that it dishonours God: Archbold's Criminal Pleading, 24th ed., p. 1131.

[LORD FINLAY referred to Mayne's Criminal Law of India, pp. 141 to 144, and to the observations of Blackburn J. on *Moxon's Case*. (2)]

The Blasphemy Act aimed at the promulgation of opinion, and not the injury to people's feelings. On the question whether the object of this company is unlawful in the sense that a legacy for that object will not be enforced, in *Briggs v. Hartley* (3) a bequest was avoided as being inconsistent with Christianity. That decision is in accordance with the view of the law expressed in *De Costa v. De Paz* (4), *Thompson v. Thompson* (5), *Thornton v. Howe* (6), and

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(1) (1882) 20 Ch. D. 169.

(4) 2 Swanst. 487, note (a);

(2) 4 St. Tr. (N.S.) 693, Amb. 228.

722, note (a).

(5) 1 Coll. 381.

(3) 19 L. J. (Ch.) 416.

(6) 31 Beav. 14.

H. L. (E.) *Cowan v. Milbourn*. (1) *Pare v. Clegg* (2) proceeded on the view that religion was not there impugned. Assume that this is merely a question of public policy, the analogy of the restraint of trade cases is illusory, because there the facts have altered. But here what change has occurred as to the belief in the truth of Christianity or as to the mischief of attacks on Christianity? And if the judges of former times have always regarded attempts to undermine Christianity as contrary to public policy, what ground is there for changing that policy? It is said that public policy is a dangerous principle, but every consideration against introducing new rules of public policy applies equally to abrogating old rules.

The House took time for consideration.

May 14. LORD FINLAY L.C. My Lords, the question in this case is as to the validity of a bequest of residue to the respondents, the Secular Society, Limited.

The right of the respondents to payment was attacked by the present appellants, the next of kin of the testator, upon the ground that the objects of the respondents' society were such that the bequest was not enforceable. The respondents took out an originating summons, dated November 25, 1914, for the payment over of the residue to them. Joyce J. decided in their favour, and his decision was upheld by the Court of Appeal.

The decision of the case must turn upon the proper construction of the memorandum of association of the respondents' society and the view to be taken of the law of England with regard to bequests for such purposes as are therein enumerated.

The memorandum of association, so far as material, is as follows:

“(3.) The objects for which the company is formed are:—

“(A) To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon super-natural belief; and that human welfare in this world is the proper end of all thought and action.

“(B) To promote the utmost freedom of enquiry and the publication of its discoveries.

(1) L. R. 2 Ex. 230.

(2) 29 Beav. 589.

“(c) To promote the secularisation of the State, so that religious tests and observances may be banished from the Legislature, the Executive, and the Judiciary.

“(d) To promote the abolition of all support, patronage, or favour by the State of any particular form or forms of religion.

“(e) To promote universal secular education, without any religious teaching in public schools maintained in any way by municipal rates or imperial taxation.

“(f) To promote an alteration in the laws concerning religion, so that all forms of opinion may have the same legal rights of propaganda and endowment.

“(g) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens.

“(h) To promote the recognition of Sunday by the State as a purely civil institution for the benefit of the people, and the repeal of all Sabbatarian laws devised and operating in the interest of religious sects, religious observances, or religious ideas.”

In my opinion the governing object of the society is that which is stated in paragraph 3 (A) of the memorandum of association, and the other objects stated in the memorandum under heads (B) to (O) of the 3rd paragraph are subsidiary. I agree with what is said by the founder of the respondent society in an article from the *Free-thinker*, June 19, 1898, which is in evidence, “Clause A is of the highest importance and governs everything else.” It was argued on behalf of the respondents that some, at all events, of the objects of the society are not affected by any taint of illegality, e.g., that 3 (D) and (E), which state disestablishment and universal secular education as objects to be promoted, are in themselves harmless. It is, of course, the fact that either of these two objects may be advocated from motives which are entirely friendly to religion. But if (A) is the governing object, then these and all the other clauses in the memorandum must be read by its light; in other words, all the other clauses in the 3rd paragraph are so many ways of carrying into practical application the principle enunciated in the 1st clause of paragraph 3. That clause, in my opinion, lays down quite clearly that human conduct should not be based upon supernatural

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belief. This amounts to a negation of all religion, including, of course, the Christian religion, as governing human conduct. If the influence of supernatural motives is to be eliminated, the Christian religion is discarded in common with all forms of religion in the ordinary sense of the term.

I think, therefore, that the memorandum shows that the object of the society was to promote in various ways the principle that human conduct should be based upon natural knowledge only, and that human welfare in this world is the proper end of all thought and action. Is a legacy in favour of a society which exists for such a purpose enforceable by English law ?

Two preliminary points were taken on behalf of the respondents. They contended, first, that the certificate of incorporation is conclusive to show that the objects of the society are not unlawful and, secondly, that some of the objects were not unlawful, and that it cannot be presumed that the legacy in question would be applied to any but lawful objects. We were informed that these points were argued on behalf of the respondents in the Court of Appeal. No notice is taken of either of them in any of the judgments, and the Court must have considered that they had been disposed of in the course of the argument. In my opinion neither is tenable. The society was registered on May 27, 1898, as a company limited by guarantee under the Companies Acts. The statute then in force was the Companies Act, 1862 (25 & 26 Vict. c. 89). The 18th section deals with the effect of registration and enacts that the certificate of incorporation shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with, and s. 192 repeats this provision and adds that the certificate is to be conclusive evidence that the company is authorized to be registered under the Acts. The amending Act of 1900 (63 & 64 Vict. c. 48) enacts by its 1st section that the certificate shall be conclusive evidence that all the requisitions of the Companies Acts in respect of registration and in matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under the Companies Acts. This provision appears to have been introduced into the Act of 1900 to get rid of some doubts which had been raised by what was said in the case of *In re National Debenture and Assets Corpora-*

tion (1), to the effect that if, in fact, only six persons had subscribed the memorandum, incorporation would not have been validly effected, and it is repeated in the 17th section of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). It was argued before us that the society could not have been properly incorporated if its objects were illegal, and that, as the certificate is conclusive to show that the company is one authorized to be registered and duly registered, it follows that it cannot for any purpose be contended that the objects are illegal. In my opinion this argument is an attempt to extend the effect of these enactments beyond their fair meaning and manifest object. What the Legislature was dealing with was the validity of the incorporation, and it is for the purpose of incorporation, and for this purpose only, that the certificate is made conclusive. This first preliminary point, in my opinion, fails. The second point also fails on the true construction of the memorandum with which I have dealt above. Taken in themselves, some of the objects, as stated in the memorandum, may be harmless, but they cannot be taken by themselves. They are mere applications of the governing principle stated in 3 (A), and we are driven back upon the question whether that object is legal.

Mr. Talbot, on behalf of the appellants, contended that it was illegal on two grounds. First, that it is criminal to attack the Christian religion, however decent and temperate may be the form of attack. Second, that a Court of law will not assist in the promotion of such objects as that for which this society is formed, whether they are criminal or not.

In support of the first of these propositions it was contended that to attack the Christian religion is blasphemy by the common law of England, and that the view put forward upon this subject by the late Lord Coleridge C.J. is erroneous. Lord Coleridge laid it down in the case of *Reg. v. Ramsay and Foote* (2) that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy." This view was controverted by Sir James Fitzjames Stephen, who, in his *History of the Criminal Law*, vol. 2, pp. 449-476, on a review of the authorities, maintained that blasphemy consisted in the character of the matter published and not in the manner in

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(1) [1891] 2 Ch. 505.

(2) 15 Cox, C. C. 231, 238.

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which it is stated, and that any attack on the Christian religion, in whatever language expressed, constituted the offence of blasphemy at common law. A reply to the arguments of Sir J. F. Stephen was made by Mr. Aspland, of the Middle Temple, Barrister-at-Law, in a pamphlet entitled "The Law of Blasphemy," published in 1884, in which the authorities up to date are collected and examined.

If Sir J. F. Stephen's view be right, any pamphlet or speech in promotion of the governing object of the respondent society would be criminal and in every sense illegal. In my opinion the appellants have failed to establish that all attacks upon religion are at common law punishable as blasphemous. There are no doubt to be found in the cases many expressions to the effect that Christianity is part of the law of England, but no decision has been brought to our notice in which a conviction took place for the advocacy of principles at variance with Christianity, apart from circumstances of scurrility or intemperance of language.

The earliest prosecution for blasphemy in the common law Courts was in the reign of Charles II.; in earlier times probably such cases were dealt with by the Ecclesiastical Courts.

The main cases on this subject prior to *Reg. v. Ramsay and Foote* (1) are:—(1.) *Rex v. Taylor* (2); (2.) *Rex v. Woolston* (3); (3.) *Rex v. Williams* (4) (in connection with which *Rex v. Mary Carlile* (5) and *Rex v. Eaton* (6) should be referred to); (4.) *Rex v. Waddington* (7); (5.) *Reg. v. Hetherington*. (8)

In the cases numbered 1, 3, 4, and 5 it is apparent on the face of the reports that the language used was scurrilous and offensive. This is less apparent in the reports of No. 2 (*Rex v. Woolston* (3)). But examination of the libels in respect of which informations in that case were filed—namely, Mr. Woolston's first, second, third, and fourth discourses of the miracles of our Saviour—shows that the sacred subjects treated by him were handled with a great deal of irreverence, and in many passages language was used by him that was blasphemous in every sense of the term. It is apparently with

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| (1) 15 Cox, C. C. 231, 238. | (5) 3 B. & Al. 167. |
| (2) 1 Vent. 293. | (6) (1812) 31 St. Tr. 927. |
| (3) Fitzg. 64; 2 Str. 834; 1 | (7) 1 B. & C. 26. |
| Barn. K. B. 162. | (8) 5 Jur. 529; 4 St. Tr. (N.S.) |
| (4) 26 St. Tr. 653. | 563. |

reference to this element that in a passage in the report in 1 Barnardiston, p. 163, the Court, in dealing with the second point made on behalf of Mr. Woolston, observed "That as the Christian religion was part of the law, whatever derided that, derided the law." The true view of the law of blasphemy appears to me to be that expressed by Lord Denman in *Reg. v. Hetherington* (1), which is substantially in accordance with that taken by Lord Coleridge in *Reg. v. Ramsay and Foote* (2), and followed by Phillimore J. in *Rex v. Boulter*. (3)

We have been referred by Lord Dunedin to the law of Scotland on this subject as stated in Hume's Criminal Law (vol. 1, p. 568), and it appears to be the case that in Scotland scurrility or indecency is an essential element of the crime of blasphemy at common law. Certain Scotch statutes which made it a crime to contravene certain doctrines have been repealed. The consequences of the view put forward on behalf of the appellants would be somewhat startling, and in the absence of any actual decision to the contrary I think we must hold that the law of England on this point is the same as that of Scotland, and that the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained.

The appellants, however, contended that, whether criminal or not, the objects for which the society was formed were such that the law would give no help for the recovery of funds to be applied in their promotion. The principle on which this part of the appellants' case rested was very clearly stated by Bramwell B. in *Cowan v. Milbourn*. (4) In the course of the argument Bramwell B. said: "An act may be illegal in the sense that it will not be recognised by the law as capable of being the foundation of any legal right, or that it may even deprive what it accompanies of that capacity, although it is followed by no penalty," and in the course of his judgment he expressed himself to the same effect. The principle is very familiar, and has been applied in innumerable cases. The question whether the present case falls within it demands a careful examination of the authorities.

In arriving at the conclusion that the object of the respondent

(1) 5 Jur. 529; 4 St. Tr. (N.S.) (2) 15 Cox, C. C. 231, 238.

563. (3) 72 J. P. 188.

(4) L. R. 2 Ex. 230, 233, 236.

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society was not unlawful in the sense that the Court will not aid the plaintiffs to get the legacy, the Court of Appeal found it necessary to overrule two cases. The first of these cases is *Briggs v. Hartley*. (1) In this case a legacy had been left for the best original essay on "The subject of Natural Theology, treating it as a Science, and demonstrating the truth, harmony, and infallibility of the evidence on which it is founded, and the perfect accordance of such evidence with reason; also demonstrating the adequacy and sufficiency of natural theology when so treated and taught as a science to constitute a true, perfect, and philosophical system of universal religion (analogous to other universal systems of science, such as astronomy, &c.) founded on immutable facts and the works of creation, and beautifully adapted to man's reason and nature, and tending, as other sciences do, but in a higher degree, to improve and elevate his nature and to render him a wise, happy, and exalted being." Shadwell V.-C. gave judgment in these terms: "I cannot conceive that the bequest in the testator's will is at all consistent with Christianity; and, therefore, it must fail."

This is a direct decision by a judge of great eminence upon the point, and in my opinion the Court of Appeal had no sufficient ground for overruling it. The second of these cases is *Cowan v. Milbourn*. (2) In that case the plaintiff had hired of the defendant some rooms at Liverpool for the purpose of having lectures delivered there. Placards were issued giving as some of the subjects of the lectures "The Character and Teachings of Christ; the former Defective, the latter Misleading," and "The Bible shown to be no more Inspired than any other Book; with a Refutation of Modern Theories thereon." The use of the rooms was refused by the defendant, and he justified his refusal by the character of the lectures proposed to be delivered. In an action in the Court of Passage, Liverpool, for breach of contract to let, the learned judge ruled that the lectures announced were blasphemous and illegal, and a verdict was entered for the defendant, with leave to the plaintiff to move to enter a verdict for him on each of these counts. Motion was made accordingly in the Court of Exchequer before Kelly C.B., Martin B., and Bramwell B. The Court refused to grant a rule, the Chief Baron expressing himself as follows: "It would be a violation of

(1) 19 L. J. (Ch.) 416, 417.

(2) L. R. 2 Ex. 230, 234, 235, 236.

duty to allow the question raised to remain in any doubt. That question is, whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His teaching, that the first is defective and the second misleading, is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land ; and that, therefore, to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to the use of his rooms."

Martin B. concurred. Bramwell B. said : " I am of the same opinion, and I will state my grounds. I think that the plaintiff was about to use the rooms for an unlawful purpose, because he was about to use them for the purpose of, ' by teaching or advised speaking,' ' denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority.' That he intended to use the rooms for the purposes declared by the statute to be unlawful is perfectly clear, for he proposed to show that the character of Christ was defective, and His teaching misleading, and that the Bible was no more inspired than any other book. That being so, his purpose was unlawful ; and if the defendant had known his purpose at the time of the refusal, he clearly would not have been bound to let the plaintiff occupy them, for, if he would, he would then have been compelled to do a thing in pursuance of an illegal purpose." Then a little further on : " Now it appears that the plaintiff here was going to use the rooms for an unlawful purpose ; he therefore could not enforce the contract for that purpose, and therefore the defendant was not bound, though he did not know the fact. It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the

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law for prostitution, a contract having prostitution for its object would be valid in a Court of law. The rule must be refused, and I do not regret the result, and on this ground, that this placard must have given great pain to many of those who read it."

The authority of these two decisions has never, so far as I am aware, been questioned in any later case, and no satisfactory reason is given in the Court of Appeal for disregarding them. The Master of the Rolls says (1): "It seems to me that the undoubted relaxation of the views as to common law blasphemy must extend to matters outside the criminal law." He goes on to say that in his view the decision in *Briggs v. Hartley* (2) ought not to be followed, and with regard to *Cowan v. Milbourn* (3) he says: "So far as I am aware this case, which was decided in 1867, has never been followed, and, notwithstanding my profound respect for the learned judges who decided it, I am bound to say that I think it ought not to be followed. If *Cowan v. Milbourn* (3) is still good law, the plaintiffs cannot claim the legacy, but as I do not consider it is good law I think Joyce J. was right in the view which he took."

Pickford L.J. says (4): "A much more difficult question is whether this object, though not illegal in the sense of being punishable, is illegal in the sense that the law will not recognize it as being the foundation of legal right and will do nothing to aid it. The denial of religion is not in terms the object of the company as set out in (a), but I think that it is involved in it, and that it is not possible to promote the principle that human conduct should be based upon natural knowledge and that human welfare is the proper end of all thought and action without at any rate inferentially denying the Divine government of the world and the principles of religion. I think there is no doubt that in former times such an object would have been held to be contrary to public policy, but the question is whether it is right to hold so now. I think that the doctrine of public policy cannot be considered as being always the same and that many things would be, and have been, held contrary to public policy which are not so held now." The learned Lord Justice goes on to refer to the cases of *Briggs v. Hartley* (2) and *Cowan v. Milbourn* (3), and says: "Whatever may have been the

(1) [1915] 2 Ch. 463-4.

(2) 19 L. J. (Ch.) 416.

(3) L. R. 2 Ex. 230.

(4) [1915] 2 Ch. 466-7.

doctrine as to public policy prevailing in 1850, when the former case was decided, I do not think that it ought now to be followed. If the latter decision means that no consideration will support a contract which involves any questioning of the truth of religion, I also think that should not be followed, but the Court may have inferred from the title to which I referred that the lectures attacked religion in a reviling and contumelious manner, and if that were the case, the decision was, I think, right."

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Warrington L.J. does not specifically refer to the case of *Briggs v. Hartley* (1), but with regard to the judgments of Kelly C.B. and Bramwell B. in *Cowan v. Milbourn* (2) he says (3): "Neither of the judges really dealt with the question whether the lectures, if not infringing a positive ordinance of law, would have rendered the contract incapable of being enforced. It is quite true that Bramwell B. laid it down that a thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it, but accepting this as correct, as I think it clearly is, it still remains to consider whether the particular thing in question is unlawful in the wider sense or not. In my opinion there is no authority binding us to hold that the promotion in a proper manner of the objects of the company is contrary to public policy, and we ought not to hold it to be so."

It may be that there has been a considerable change of public opinion with regard to the discussion of religion, but the question is whether anything has taken place to justify any Court in holding that the principle of law on this matter may be treated as obsolete. From time to time the standard as to what is decent discussion of religious subjects may vary, and in one age a jury would find that a particular publication was blasphemous in the strict sense of the term which would not be so considered in another. With regard to questions of public policy, such as those arising in connection with restraint of trade, circumstances with regard to facility of communication and of travel may so alter that the principle invalidating such contracts would apply to a particular state of circumstances in one age but not in another. But it is difficult to see how a change in the spirit of the time could justify

(1) 19 L. J. (Ch.) 416.

(2) L. R. 2 Ex. 230.

(3) [1915] 2 Ch. 473.

H. L. (E.) a change in a principle of law by judicial decision. Such changes in public opinion may lead to legislative interference and substantive alteration of the law, but cannot justify a departure by any Court from legal principle, however they may affect its application in particular cases.

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The decisions in *Briggs v. Hartley* (1) and *Cowan v. Milbourn* (2) are in conformity with a considerable body of authority on this subject.

It has been repeatedly laid down by the Courts that Christianity is part of the law of the land, and it is the fact that our civil polity is to a large extent based upon the Christian religion. This is notably so with regard to the law of marriage and the law affecting the family. The statement that Christianity is part of the law of the land has been often given as a reason for punishing criminally contumelious attacks upon Christianity. It is true that expressions have in some cases been used which would seem to imply that any attack upon Christianity, however decently conducted, would be criminal. For the reasons I have already given I do not think that this view can be accepted as having represented the common law of England at any time. But the fact that Christianity is recognized by the law as the basis to a great extent of our civil polity is quite sufficient reason for holding that the law will not help endeavours to undermine it.

These two cases do not stand alone.

In 1754 the case of *De Costa v. De Paz* (3) came before Lord Hardwicke, the question arising upon a will which directed that the investment of 1200*l.* and the revenue arising therefrom should be applied for ever in the maintenance of a Jesiba, or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion. A bill was brought to have the money laid out according to the will, and, as stated in the report, "The Lord Chancellor upon the opening asked, if there had ever been a case where such a charity as this had been established, for it being against the Christian religion, which is part of the law of the land, he thought he could not decree it." After argument Lord Hardwicke said that the first question was "whether the

(1) 19 L. J. (Ch.) 416.

(2) L. R. 2 Ex. 230.

(3) 2 Swanst. 487, note (a), 488-490; Amb. 228.

legacy in question is good, and such as this Court can or ought to establish." He pointed out that the case would be different where the legacy was for the support of poor persons of the Jewish religion, and then proceeds as follows: "But this is a bequest for the propagation of the Jewish religion; and though it is said, that this is a part of our religion, yet the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord Hale and Lord Raymond; and it undoubtedly is so; for the constitution and policy of this nation is founded thereon. As to the Act of Toleration no new right is given by that, but only an exemption from the penal laws. The Toleration Act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the dissenters under certain regulations and tests. This renders those religions legal, which is not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the Legislature."

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Accordingly Lord Hardwicke declared he was of opinion that the legacy was not good in law, and ought not to be decreed or established by the Court.

In 1819, in the case of *In re Bedford Charity* (1), Lord Eldon referred to the case of *De Costa v. De Paz* (2) as establishing that no one can found, by charitable donation, an institution for the purpose of teaching the Jewish religion, and made the following observations: "I apprehend that it is the duty of every judge presiding in an English Court of justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church, or synagogue, to recollect that Christianity is part of the law of England."

It will be observed that the case of *De Costa v. De Paz* (2) is a decision given by Lord Hardwicke in 1754 and approved by Lord Eldon in 1819, to the effect that a legacy for the promotion of the Jewish religion was not enforceable, as being for the promotion of a faith contrary to Christianity. Secularism, as explained in the respondents' memorandum, is much more contrary to Christianity than is the Jewish religion. The Jews have been relieved

(1) 2 Swanst. 470, 522, 527.

(2) 2 Swanst. 487, note (a), 488-490; Amb. 228.

H. L. (E.) by the Jewish Relief Act, 1846 (9 & 10 Vict. c. 59), s. 2, but there is no statute in similar terms with regard to those holding the views expressed by the memorandum of the respondent society.

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In *Lawrence v. Smith* (1) a bill was filed to restrain the piracy of some lectures delivered at the College of Surgeons. An ex parte injunction was granted, and a motion was made by the defendant to dissolve the injunction on the ground that the work could not be the subject of copyright, and passages were referred to which it was contended were hostile to natural and revealed religion and denied the immortality of the soul. The Lord Chancellor said, in giving judgment (2): "Looking at the general tenour of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided, he may apply again."

In a note on p. 474 it is stated that in *Murray v. Benbow* (3) Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendant from publishing a pirated edition of Lord Byron's poem "Cain," and that the Lord Chancellor, after reading the work, refused the motion on grounds similar to those stated in *Lawrence v. Smith*. (1) A note of Lord Eldon's judgment on that application is given in the preface to "Cain" in the large octavo edition of Byron's works, published in 1846 by John Murray, p. 317.

In *Thompson v. Thompson* (4), a question having arisen as to a bequest for literary purposes with reference to the doctrines maintained in the testator's writings, the Vice-Chancellor (Sir J. L. Knight Bruce) said: "Understanding it to be admitted, that the testator's writings, published and unpublished, contain nothing irreligious, illegal, or immoral, I have no doubt that this is a legal disposition, according to the law of England;" and he held the bequest good, "supposing neither atheism, sedition, nor any other crime or immorality to be inculcated

(1) Jac. 471.

(2) Ibid. 473.

(3) Feb., 1822.

(4) 1 Coll. 381, 392, 397.

by the works." Here Sir J. L. Knight Bruce recognized the doctrine that a bequest for irreligious purposes could not be enforced.

In 1850 the case of *Briggs v. Hartley* (1) was decided.

In the case of *Pare v. Clegg* (2) it was contended that the claim of the plaintiff as creditor of a society called the National Community Society (which afterwards took the name of the Rational Society) must fail on the ground that the society was founded for an immoral and illegal purpose. The Master of the Rolls, Lord Romilly, in delivering judgment dealt with this contention as follows (3): "The charges against it" (the society) "are, that it was founded, first, for the purpose of propagating natural religion, to the injury of revealed religion; secondly, in order to put an end to all moral restraint on the actions of mankind; and, thirdly, with a view to destroy the institution of private property generally. I have perused the rules of the society for the purpose of considering the force of this objection, and although I am of opinion that the society is based upon irrational principles, and seeks to realise a visionary and unattainable object, it is not, I think, to be considered as founded for the purpose of propagating irreligious and immoral doctrines in the ordinary and proper sense of those words. It is not such a society as that a person dealing with it could not acquire the right to enforce a contract entered into with him by the society." This implies that if the result of the examination of the rules had been to show that the society was formed for irreligious purposes the decision might have been the other way.

These authorities, beginning with *De Costa v. De Paz* (4) in 1754 and ending with *Pare v. Clegg* (2) in 1861, appear to me to establish that the Courts will not help in the promotion of objects contrary to the Christian religion, apart altogether from any criminal liability, and to show that *Briggs v. Hartley* (1) and *Cowan v. Milbourn* (5) were well decided, and that, if the law of England is to be altered upon the point, the change must be effected, not by judicial decision, but by the act of the Legislature.

It is foreign to the subject of the present inquiry to consider whether the welfare of the individual and the greatness of the nation

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(1) 19 L. J. (Ch.) 416.

(2) 29 Beav. 589.

(3) Ibid. 601.

(4) 2 Swanst. 487, note (a);
Amb. 228.

(5) L. R. 2 Ex. 230.

H. L. (E.) would be best promoted by proceeding on the lines of the Secular Society, involving the ignoring of the supernatural as influencing human conduct, and holding out the promotion of happiness in this world as the chief end of man, or upon the lines indicated in the striking passage with which Lord Bacon concludes his Essay on Atheism and the still more striking quotation from Cicero which he there makes. Such considerations bear upon public policy and may have had some influence in moulding the English law upon the subject. But we have to deal not with a rule of public policy which might fluctuate with the opinions of the age, but with a definite rule of law to the effect that any purpose hostile to Christianity is illegal. The opinion of the age may influence the application of this rule but cannot affect the rule itself. It can never be the duty of a Court of law to begin by inquiring what is the spirit of the age and in supposed conformity with it to decide what the law is. Very nice and difficult questions may arise as to whether in any particular case the purpose is hostile to the Christian religion. No such difficulty arises in the present case, as by the memorandum of association the axe is laid to the root of the tree of all religion.

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The legacy was given and would be taken for the purposes of the society, as stated in the memorandum, and if these purposes are illegal their illegality is not mended by the certificate of incorporation. In my opinion they are illegal in the sense that the law will not aid in their promotion and this appeal ought to be allowed.

LORD DUNEDIN. My Lords, before I had committed my views in this case to writing I had the advantage of seeing not only the judgment just delivered by the Lord Chancellor, but also those about to be delivered by my noble and learned friends Lord Parker and Lord Buckmaster. In these there is contained so much that not only has my adhesion, but is expressed better than I could hope to do, that I shall refer to them for several of the propositions on which my judgment rests, and shall only state succinctly the reasons which have led me, though not without hesitation, to the conclusion that this appeal should be dismissed.

My Lords, I have said that I have formed my opinion not without hesitation; but that hesitation is due to one fact only. Had there been no authorities to deal with, and I were to approach the matter

from the point of view of legal principle alone, I do not think I should have felt much difficulty. What has troubled me is that I think it is impossible to decide the case as I think it should be decided without going counter to what has been said by judges of great authority in past generations. It is always, I feel, no light matter to overrule such pronouncements.

I shall first deal with two points which must be resolved before the case can be further considered, but on which, for the reason already mentioned, I shall adopt the opinion of others as my own. I agree with what I understand is the unanimous opinion of your Lordships, that as to what is necessary to constitute the crime of blasphemy at common law the dicta of Erskine J., Lord Denman C.J., and Lord Coleridge C.J. in the cases of *Shore v. Wilson* (1), *Reg. v. Hetherington* (2), and *Reg. v. Ramsay* (3) respectively are correct, and I adopt the reasoning of the Lord Chancellor and Lord Buckmaster. Further, I agree with the Lord Chancellor that, on a fair construction, paragraph 3 (A) of the memorandum of association of the respondent company expresses the dominating purpose of the company; and that the other matters are mentioned not as independent, but only as subsidiary aims. I agree with him in thinking that teaching in accordance with 3 (A) is inconsistent with and to that extent subversive of the Christian religion—by which expression, without attempting definition, I mean all such forms of religion as have for a common basis belief in the Godhead of the Lord Jesus Christ.

It is said for the appellants that the Court will not lend its assistance for the furtherance of an illegal object, and that money given to the society must needs be illegally applied, because it certainly can only be used for objects in terms of the memorandum, and such objects are illegal, because the Christian religion is part of the law of the land. Now if money was laid out in either procuring publications or lectures in terms of the objects of the memorandum such publications or lectures need not be couched in scurrilous language and so need not be such as would constitute the crime of blasphemy at common law. Nor need they be criminal under the Blasphemy Act; for here I agree with Lord Buckmaster that the Act is so

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(1) 9 Cl. & F. 355, 524.

(2) 4 St. Tr. (N.S.) 563.

(3) 15 Cox, C. C. 231.

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framed as to make its penalties only apply when there has been what may be termed apostasy. It would not, I think, be safe to found any argument on the fact—but it is a fact sufficiently curious to be mentioned—that the Scottish Parliament two years before the Blasphemy Act passed an Act in similar terms, but omitting the words “having been educated in or at any time having made profession of the Christian religion, &c.” In the repealing Act, 50 Geo. 3, c. 160, this and another older Scottish Act are repealed in toto, while the Blasphemy Act was allowed to stand. How innocuous it was on a true construction may be surmised from the fact that there seem to have been no prosecutions under it.

Criminal liability being negatived, no one has suggested any statute in terms of which it—by which I mean the supposed use of the money—is directly prohibited. There is no question of offence against what may be termed the natural moral sense. Neither has it been held, I think, as being against public policy, as that phrase is applied in the cases that have been decided on that head. Now if this is so, I confess I cannot bring myself to believe that there is still a *terra media* of things illegal, which are not criminal, not directly prohibited, not *contra bonos mores*, and not against public policy. Yet that, I think, is the result of holding that anything inconsistent with Christianity as part of the law of England cannot in any way be assisted by the action of the Courts.

The Lord Chancellor has reviewed the authorities which he holds to be contrary to this opinion. Undoubtedly there are dicta; but so far as concerns actual judgments they might, I think, all be supported on grounds not inconsistent with this opinion, except *Briggs v. Hartley* (1) and *Cowan v. Milbourn*. (2) On the other hand, the opinions of the consulted judges in *Shore v. Wilson* (3) (including those of Parke B. and Tindal C.J.) are, in my view, clearly inconsistent with the decision in *Briggs v. Hartley* (1), and in favour of the view I am holding. For it is, I think, impossible to hold that the terms of 53 Geo. 3, c. 160, effected anything more than relief from statutory penalties and disqualifications, and equally impossible to say that Unitarian doctrine is,

(1) 19 L. J. (Ch.) 416.

(2) L. R. 2 Ex. 230.

(3) 9 Cl. & F. 355, 499-578.

in the words used by Shadwell V.-C. in *Briggs' Case* (1), "consistent with Christianity." I do not say more about the cases, because they are to be reviewed with great minuteness by Lord Buckmaster, in whose views I entirely concur.

It is not, however, on this point alone that I desire to rest my judgment. So far I have dealt with the matter as if the question were one of contract or of trust. Now that there is no trust here is, I think, clear beyond doubt. The trust to be constituted must either be found in some expression of the donor—here the testator—relative to the gift, or in the fact that the donee—here the society—is a trustee, and that the gift is only given to him in that capacity. But the testator has clogged his gift with no conditions. He has made an absolute gift to a legal entity which is entitled to receive money. The certificate of incorporation in terms of the section quoted of the Companies Act, 1900, prevents any one alleging that the company does not exist. Then the law of *Ashbury Railway Carriage and Iron Co. v. Riche* (2) is based upon the consideration of what is and what is not *intra vires* of a statutory corporation, but I have never heard it suggested that it made a company a trustee for the purposes of its memorandum. I do not say more, for here I wish respectfully to concur with what is said on this subject by Lord Parker. Trust being out of the reckoning, there can be no doubt that there is here no question of contract. What remains? Nothing but an ordinary action for a legacy at the instance of a legal person that has a right to sue. It is here that I feel disposed to quarrel with the phrase "the assistance of the Courts." I do not see that the company is seeking the assistance of the Courts to carry out the objects of the memorandum. It is seeking their assistance only to compel the executor to do his duty, so that it may receive what is legally due to it. If the legacy were due to an individual, the executor would not be heard to discuss the probable uses to which the legatee would put the money. I do not think he can do so in the case of the society. For after all—and treating the memorandum, in spite of the opinion I have expressed already, as indicating purposes entirely illegal such as in contract would not serve as foundation for an action—there is no reason why the society should not employ the money in paying

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(1) 19 L. J. (Ch.) 416.

(2) (1875) L. R. 7 H. L. 653.

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its office rent. For these reasons and those to be more fully stated by my noble and learned friends who are to follow me I am of opinion that this appeal should be dismissed, and I move your Lordships accordingly.

LORD PARKER OF WADDINGTON. (1) My Lords, in considering the questions which arise for decision on this appeal, it is, I think, well to bear in mind certain general and perhaps somewhat elementary principles. At common law the conditions essential to the validity of a gift are reasonably clear. The subject-matter must be certain; the donor must have the necessary disposing power over, and must employ the means recognized by common law as sufficient for the transfer of, the subject-matter; and, finally, the donee must be capable of acquiring the subject-matter. If these conditions be fulfilled, the property in the subject-matter of the gift passes to the donee, and he becomes the absolute owner thereof and can deal with the same as he thinks fit. The common law takes no notice whatever of the donor's motive in making the gift or of the purposes for which he intends the property to be applied by the donee, or of any condition or direction purporting to affect its free disposition in the hands of the donee. It is immaterial that the gift is intended to be applied for a purpose actually illegal—as, for example, in trade with the King's enemies—or in a manner contrary to the policy of the law—as, for example, in paying the fines of persons convicted of poaching. In either case, the essential conditions being fulfilled, the gift is complete, the property has passed, and there is an end of the matter. A gift at common law is never executory in the sense that it requires the intervention of the Courts to enforce it.

With regard to the conditions essential to the validity of a gift, equity follows the common law. On the one hand, if the subject-matter be property transferable at common law, equity will not as a rule aid a gift which does not fulfil the essential conditions. On the other hand, when the property is transferable in equity only, equity also requires that the subject-matter must be certain, that the donor must have the necessary disposing power, and must employ the means which equity recognizes as sufficient for a transfer

(1) Read by Lord Shaw of Dunfermline.

of the subject-matter, and that the donee must be capable of acquiring the subject-matter. If a donee sues in equity to recover the subject-matter he sues by virtue of an equitable estate already vested in him, and not to enforce the gift. Under certain circumstances, however, the donee does not in equity, even if all the requisite conditions be fulfilled, obtain an absolute interest. The gift may have been obtained by duress or undue influence, in which case it will be set aside in equity, and if the donee has obtained any legal property he will be compelled to restore it to the donor or those claiming under him. Again, the circumstances of the gift or the directions given or objects expressed by the donor may be such as to impose on the donee the character of a trustee. In such a case equity will enforce the trust so far as may be, and, if for any reason the trust fails, will imply a resulting trust in favour of the donor or those claiming under him. But, except so far as they may be relevant on the points above mentioned, equity does not any more than the common law pay any attention to the donor's motives in making the gift or to the purposes for which he intends the property to be applied by the donee, or to any condition or direction affecting its free disposition in the hands of the donee. The question whether a trust be legal or illegal or be in accordance with or contrary to the policy of the law only arises when it has been determined that a trust has been created, and is then only part of the larger question whether the trust is enforceable. For, as will presently appear, trusts may be unenforceable and therefore void, not only because they are illegal or contrary to the policy of the law, but for other reasons.

It may be well to illustrate what I have said by one or two examples. Thus, if a testator gives 500*l.* to A., saying that he knows A. will expend it in procuring masses to be said for testator's soul, the question arises whether A. is a trustee for the purpose indicated. If he be not a trustee, he will in equity take the legacy beneficially; the fact that the trust, if there be a trust, would be unlawful being quite immaterial. If, however, it be held that A. is a trustee, then, as the trust is unlawful, equity will not allow the trustee to retain the legacy. Again, in the case of a simple legacy of 500*l.* to A., where conversations had taken place between A. and the testator as to the purposes for which the legacy should

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be applied, the question would arise whether these conversations rendered it unconscionable for A. to take the legacy for his own use. If so, equity would treat him as a trustee. If not, it would allow him to retain the legacy, although the purpose for which the legacy was intended by the testator was unlawful or otherwise unenforceable. Again, it is well settled that a gift to A. to help him in his business is an absolute gift to A., and it is therefore immaterial whether A.'s business is that of a corn merchant or a receiver of stolen goods. If, however, A. were a trustee the character of the business would be material in considering whether the trust was one which equity would carry into execution.

My Lords, in the present case you will find that the testator has given his residuary estate through the medium of trustees for sale and conversion to the Secular Society, Limited, and the question is as to the validity of this gift. There is no doubt as to the certainty of the subject-matter, or as to the testator's disposing power, or as to the validity of his will. So far as the conditions essential to the validity of the gift are concerned, the only doubt is as to the capacity of the donee.

The Secular Society, Limited, was incorporated as a company limited by guarantee under the Companies Acts, 1862 to 1893, and a company so incorporated is by s. 17 of the Act of 1862 capable of exercising all the functions of an incorporated company. *Prima facie*, therefore, the society is a corporate body created by virtue of a statute of the realm, with statutory power to acquire property by gift, whether *inter vivos* or by will. The appellants endeavour to displace this *prima facie* effect of the Companies Acts in the following manner. If, they say, you look at the objects for which the society was incorporated, as expressed in its memorandum of association, you will find that they are either actually illegal or, at any rate, in conflict with the policy of the law. This being so, the society was not an association capable of incorporation under the Acts. It was and is an illegal association, and as such incapable of acquiring property by gift. I do not think this argument is open to the appellants, even if their major premise be correct. By the 1st section of the Companies Act, 1900, the society's certificate of registration is made conclusive evidence that the society was an association authorized to be registered—that

is, an association of not less than seven persons associated together for a lawful purpose. The section does not mean that all or any of the objects specified in the memorandum, if otherwise illegal, would be rendered legal by the certificate. On the contrary, if the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money had been applied were expressly authorized by the memorandum. In like manner a contract entered into by the company for an unlawful object, whether authorized by the memorandum or otherwise, could not be enforced either in law or in equity. The section does, however, preclude all His Majesty's lieges from going behind the certificate or from alleging that the society is not a corporate body with the status and capacity conferred by the Acts. Even if all the objects specified in the memorandum were illegal, it does not follow that the company cannot on that account apply its funds or enter into a contract for a lawful purpose. Every company has power to wind up voluntarily, and moneys paid or contracts entered into with that object are in every respect lawfully paid or entered into. Further, the disposition provided by the company's memorandum for its surplus assets in case of a winding up may be lawful though all the objects as a going concern are unlawful. If there be no lawful manner of applying such surplus assets they would on the dissolution of the company belong to the Crown as bona vacantia : *Cunnack v. Edwards*. (1)

My Lords, some stress was laid on the public danger, or at any rate the anomaly, of the Courts recognizing the corporate existence of a company all of whose objects, as specified in its memorandum of association, are transparently illegal. Such a case is not likely to occur, for the registrar fulfils a quasi-judicial function, and his duty is to determine whether an association applying for registration is authorized to be registered under the Acts. Only by misconduct or great carelessness on the part of the registrar could a company with objects wholly illegal obtain registration. If such a case did occur it would be open to the Court to stay its hand until an opportunity had been given for taking the appropriate steps for the cancellation of the certificate of registration. It should be observed that neither s. 1

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of the Companies Act, 1900, nor the corresponding section of the Companies (Consolidation) Act, 1908, is so expressed as to bind the Crown, and the Attorney-General, on behalf of the Crown, could institute proceedings by way of certiorari to cancel a registration which the registrar in affected discharge of his quasi-judicial duties had improperly or erroneously allowed. But, as will appear later, I do not think that the present is a case requiring such action on the part of your Lordships' House.

My Lords, it follows from what I have already said that the capacity of the Secular Society, Limited, to acquire property by gift must be taken as established, and, all the conditions essential to the validity of the gift being thus fulfilled, the donee is entitled to receive and dispose of the subject-matter thereof, unless either (1.) the gift was obtained by duress or undue influence, or (2.) there is something which in a Court of Equity imposes on the donee the character of a trustee. Admittedly there is no question of duress or undue influence, and in my opinion it is impossible to hold that the donee was intended to take or in fact takes the subject-matter as trustee or in any other character than that of absolute owner. It should be observed that the testator says nothing as to how he desires his residuary estate to be applied in the hands of the society, nor is there any evidence that he made any communication to any one on behalf of the society with regard to such application. The only possible argument in favour of the testator's intention to create a trust rests upon this : The society is a body corporate to which the principle of your Lordships' decision in *Ashbury Railway Carriage and Iron Co. v. Riche* (1) is applicable. Its funds can only be applied for purposes contemplated by the memorandum and articles as originally framed or altered under its statutory powers. A gift to it must, it may be said, be considered as a gift for those purposes, and therefore the society is a trustee for those purposes of the subject-matter of the gift. This argument is, in my opinion, quite fallacious. The fact that a donor has certain objects in view in making a gift does not, whether he gives them expression or otherwise, make the donee a trustee for those objects. If I give property to a limited company to be applied at its discretion for any of the purposes authorized by its memorandum and articles, the com-

(1) L. R. 7 H. L. 653.

pany takes the gift as absolutely as would a natural person to whom I gave a gift to be applied by him at his discretion for any lawful purpose. The case of *Attorney-General v. Haberdashers' Co.* (1) is an express authority on this point. A gift of a fund on trust to pay the income thereof in perpetuity to a society, whether corporate or otherwise, might possibly, if the objects of the society were charitable, be established as a charitable gift, exempt from objection on the ground that it created a perpetuity. But it is one thing to establish a gift (which would otherwise fail) on the ground that it is charitable, and quite another thing to avoid a gift which would otherwise be good on the ground that it creates an unenforceable trust. If a gift to a corporation expressed to be made for its corporate purposes is nevertheless an absolute gift to the corporation, it would be quite illogical to hold that any implication as to the donor's objects in making a gift to the corporation could create a trust. The argument, in fact, involves the proposition that no limited company can take a gift otherwise than as trustee. I am of opinion, therefore, that the society, being capable of acquiring property by gift, takes what has been given to it in the present case, and takes it as absolute beneficial owner and not as trustee.

My Lords, the above considerations appear to me to be alone sufficient to dispose of this appeal. Nevertheless, I will proceed to consider the matter on the footing that the society takes in the character of trustee. On that footing it seems to me that the trust is clearly void, and that the appellants ought to succeed, whatever opinion your Lordships hold on the questions which were argued before the House. A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the Courts in this country recognize as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty. A simple instance of this is a gift for charitable or benevolent purposes. Such a gift is void, for benevolent purposes are, as is well settled, not necessarily charitable: *Morice v. Bishop of Durham* (2); *James v.*

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(1) [(1834)] 1 My. & K. 420.

(2) (1805) 10 Ves. 522.

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Allen (1); *In re Jarman's Estate*. (2) Now if your Lordships will refer for a moment to the society's memorandum of association you will find that none of its objects, except, possibly, the first, are charitable. The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the association be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift. The same considerations apply when there is a trust for the publication of a book. The Court will examine the book, and if its objects be charitable in the legal sense it will give effect to the trust as a good charity: *Thornton v. Howe* (3); but if its object be political it will refuse to enforce the trust: *De Themmines v. De Bonneval*. (4) If, therefore, there be a trust in the present case it is clearly invalid. The fact, if it be the fact, that one or other of the objects specified in the society's memorandum is charitable would make no difference. There would be no means of discriminating what portion of the gift was intended for a charitable and what portion for a political purpose, and the uncertainty in this respect would be fatal.

My Lords, the only way of meeting this difficulty would be to argue in favour of a general charitable intention on the part of the testator. The rule of equity in this respect is well known, and, however admirable in the interest of the public, has, I think, gone further than any other rule or canon of construction in defeating the real intention of testators. Perhaps the most striking instance

(1) (1817) 3 Mer. 17.

(3) 31 Beav. 14.

(2) (1878) 8 Ch. D. 584.

(4) (1828) 5 Russ. 288.

of the application of the rule is the case of *De Costa v. De Paz* (1), to which I shall have to return presently. There the trust was for the purpose of establishing an assembly for reading the Jewish law and instructing the people in the Jewish religion. The Jewish Relief Act had not yet been passed, and therefore the gift could not be applied as directed by the testator. Nevertheless Lord Hardwicke held that, the gift being for a religious purpose, the testator had manifested a general charitable intent, and accordingly the fund was applied for paying a preacher to instruct children in the Christian instead of the Jewish religion.

Any argument in favour of the testator's general charitable intention in the present case would have to proceed on the footing that the society's first and paramount object was charitable, and that its subsequent objects, though not charitable in themselves, were entirely subsidiary to the first object. It would be an argument depending for its validity on the true construction of the memorandum, and precisely analogous to that urged by the appellants in support of their contention that because the society's first object was illegal all its other objects were also illegal, or, as they put it, tinged with illegality. I will consider the two arguments together.

The only object specified in the company's memorandum of association which can of itself be said to be either charitable or illegal is the first. All the other specified objects are in themselves clearly non-charitable, and admittedly legal. The suggestion must be that the charitable or illegal character of the first object so clearly manifests a charitable or illegal intention on the part of the testator that all the subsequent objects (being non-charitable) must, on the hypothesis that the first is charitable, be ignored altogether, or being legal must, on the hypothesis that the first is illegal, be themselves treated as illegal. Such suggestion, when analysed, appears to rest entirely on the assumption that the object first specified in the memorandum must be the paramount object, and that all the other specified objects must be subsidiary or subordinate. Such an assumption introduces a new, and in my opinion a very dangerous, canon of construction. Moreover, in the present case it appears to be inconsistent with the terms of the memorandum itself. The first object is to promote the principle therein referred to, not in such manner

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(1) 2 Swanst. 487, note (a); Amb. 228.

H. L. (E.) as thereafter mentioned, but in such ways as may from time to time
 1917 be determined. This can only point to the subsequent objects being
 distinct or independent objects. Moreover, one of those objects,
 BOWMAN that lettered (L), is "to assist by votes of money or otherwise other
 v. societies or associated persons or individuals who are specially pro-
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How can it be argued that the society is precluded from giving assistance to societies or individuals who, while repudiating the society's first object, advocate the secularization of education or the disestablishment of the Church on political or even on religious grounds? It is impossible to limit the societies or individuals to whom assistance may be granted to such as uphold the principle referred to in the society's first object. It is equally impossible to treat an act expressly authorized by the memorandum as ultra vires the company because of the motive by which the agents of the company may be inspired. The whole frame of the memorandum points to the company having distinct and separate objects, and not to the first object being paramount and the others subsidiary. Any argument in favour of a general charitable or a general illegal intention must therefore fail. Just as the objects of the society which the testator had in view in making the gift cannot be said to be illegal merely because the first object specified in the memorandum is illegal, so also if the society takes as trustee it cannot be said that the testator had a general charitable intention sufficient to support the trust merely because the first object specified in the memorandum is charitable. It follows that the trust, if a trust has been created, is wholly invalid, whether the first object is on the one hand charitable or on the other hand illegal.

My Lords, I will next proceed to consider whether a trust for the first object specified in the memorandum would be a valid trust. The society's first object is "to promote . . . the principle that human conduct should be based upon natural knowledge and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action." A trust to promote or advocate this principle would certainly not be a trust for the benefit of individuals. But could it be established as a charitable trust? It is certainly not within the preamble of

the statute 43 Eliz. c. 4. This is not conclusive, though the Courts have taken such preamble as their guide in determining what is or is not charitable. It is not a religious trust, for it relegates religion to a region in which it is to have no influence on human conduct. The principle may have its attractions for certain types of mind, but on analysis it appears to be extremely vague and ambiguous. The first branch does not prescribe the end to which human conduct is to be directed. It merely says that whatever aim a man has in view he is to base his conduct on natural knowledge rather than on supernatural belief. This may merely mean that if, for example, we desire to defeat our enemies we should avail ourselves of all known scientific means, and not rest idle in the belief that there is a special providence looking after our interests. The meaning intended must necessarily be obscure until the terms "natural knowledge" and "supernatural belief" are more narrowly defined. Passing to the second branch of the principle, it is, I think, equally obscure. It lays down dogmatically what ought to be the end of all human thought and action, "so think and act as to secure human welfare in this world." No hint is given as to what constitutes human welfare, a point on which there is the widest difference of opinion, or as to why any one should act on the precept unless it be assumed that altruism is merely enlightened egoism. It would in my opinion be quite impossible to hold that a trust to promote a principle so vague and indefinite was a good charitable trust. Even if the principle to be promoted were as definite as Kant's categorical imperative, I doubt whether a trust for its promotion would be charitable.

My Lords, it remains to consider the question (which formed the chief topic of argument at your Lordships' Bar) whether the promotion of the principle specified as the society's first object is either illegal or against the policy of the law. A trust for the promotion of the principle being unenforceable on other grounds, this question could only arise on a criminal prosecution for blasphemy or in an action to enforce a contract entered into for the purpose of promoting the principle. In discussing it I shall assume that the principle involves a denial of or an attack upon some of the fundamental doctrines of the Christian religion.

My Lords, on the subject of blasphemy I have had the advantage

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H. L. (E.) of reading, and I entirely agree with, the conclusions arrived at by my noble and learned friends the Lord Chancellor and Lord Buckmaster. In my opinion to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace. I cannot find that the common law has ever concerned itself with opinion as such, or with expression of opinion, so far as such expression is compatible with the maintenance of public order. Indeed there is express authority that heresy as such is outside the cognizance of a criminal Court unless the heretic by setting up conventicles or otherwise endangers the peace: see *Hawkins' Pleas of the Crown*, vol. 1, p. 354. The contrary view appears to be based on various dicta (I do not think they are more than dicta) to the effect that Christianity is part of the law of the land, the suggested inference being that to attack or deny any of its fundamental doctrines must therefore be unlawful. The inference of course depends on some implied major premise. If the implied major premise be that it is an offence to speak with contumely or even to express disapproval of existing law, it is clearly erroneous. If, on the other hand, the implied major premise is that it is an offence to induce people to disobey the law, the premise may be accepted, but to avoid a non sequitur it would be necessary to modify the minor premise by asserting that it is part of the law of the land that all must believe in the fundamental doctrines of Christianity, and this again is inadmissible. Christianity is clearly not part of the law of the land in the sense that every offence against Christianity is cognizable in the Courts.

A good deal of stress was laid in this connection upon the Blasphemy Act (9 & 10 Will. 3, c. 32), and its provisions undoubtedly give rise to certain difficulties. I think, however, for reasons which will appear later, that this Act should be construed as imposing, in the case of persons educated in or who have at any time professed the Christian religion, certain additional penalties for the common law offence rather than as creating a new statutory offence. The fact that there has, so far as can be discovered, never been a prosecution for an offence under the Act points to this view having been generally accepted.

My Lords, on the question whether the promotion of the principle

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in question is against public policy as opposed to being illegal in the criminal sense the appellants relied principally on two authorities—namely, *Cowan v. Milbourn* (1) and *Briggs v. Hartley*. (2) In the former case the Court, consisting of Kelly C.B., Martin B., and Bramwell B., refused to enforce a contract for the hire of rooms, the purpose of the hirer being to use the rooms for certain lectures, one of which, as advertised, was to be on “The Character and Teachings of Christ; the former Defective, the latter Misleading,” and another on “The Bible shown to be no more Inspired than any other Book.” Kelly C.B. was of opinion that the first of these lectures could not be delivered without blasphemy. He referred especially to the fact that Christianity was part of the law of the land. Martin B. agreed. Bramwell B. quoted the Blasphemy Act, and said that the rooms were clearly intended to be used for a purpose declared by the statute to be unlawful. It appears, therefore, that all three judges considered that the purpose was unlawful in the strict sense, though Bramwell B. referred to the distinction between things actually unlawful in the sense of being punishable and things unlawful in the sense of being contrary to the policy of the law. This, however, appears to have been unnecessary for the decision. The Court refused to enforce the contract. In the case of *Briggs v. Hartley* (2) the testator had created a trust to provide a prize for the best essay on natural theology, treated as a science, and sufficient when so treated to constitute a true, perfect, and philosophical system of universal religion. Shadwell V.-C. held the trust void as inconsistent with Christianity. In my opinion the first of these cases might possibly be supported on the footing that the lectures intended to be given would involve vilification, ridicule, or irreverence likely to lead to a breach of the peace. In so far as it decided that any denial of or attack upon the fundamental doctrines of Christianity was in itself blasphemous either at common law or under the statute, I think it was wrong. The second case, however, appears to be a direct authority on the point at issue, for the trust was clearly a good charity unless it could be held contrary to the policy of the law.

My Lords, I desire to call the attention of the House to certain general considerations and to certain authorities which have led

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(1) L. R. 2 Ex. 230.

(2) 19 L. J. (Ch.) 416.

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me to the conclusion that *Briggs v. Hartley* (1) was wrongly decided and that there is nothing contrary to the policy of the law in an attack on or a denial of the truth of Christianity or any of its fundamental doctrines, provided such attack or denial is unaccompanied by such an element of vilification, ridicule, or irreverence as is necessary for the common law offence of blasphemy. In the first place I desire to say something as to the history of religious trusts.

Trusts for the purposes of religion have always been recognized in equity as good charitable trusts, but so far as I am aware there is no express authority dealing with the question what constitutes religion for the purpose of this rule. Prior to the Reformation that form of Christianity now called Roman Catholic was undoubtedly within the rule, but the same cannot be said with equal certainty of other forms of Christianity or of the Jewish religion, which has little in common with Christianity except its monotheism and its belief in the inspiration of the Old Testament. After the Reformation Anglican Christianity was undoubtedly within the rule, but this cannot be said with equal certainty of Roman Catholicism or of any form of Protestant dissent or of the religion of the Jews. The question is complicated by the fact that the Reformation was followed by a number of penal statutes enforcing conformity with the Established Church and imposing penalties on the exercise of any other form of religion, whether Christian or otherwise. As long as these statutes remained in force no trust for the purposes of any other religion than the Christian religion, or of any form of Christianity other than the Anglican, were enforceable, because it was clearly against public policy to promote a religion or form of religion the exercise of which was penalized by statute. The fact that no such trust was enforceable does not show that it was not a trust for the purposes of religion within the meaning of the rule.

The Revolution of 1688 was followed by the Toleration Act of that year, which exempted Protestant dissenters from the penalties imposed by the earlier Acts, but provided that nothing therein contained should afford any protection to Roman Catholics or persons denying the Trinity. From the date of this Act all trusts for the religious purposes of any nonconformist body entitled to the

benefit of its provisions have been held good charitable trusts, and inasmuch as the provisions of the Act do not deal with the validity of trusts, but merely give exemption from penalties, I think we are safe in assuming that, in the equitable rule as to trusts for the purposes of religion being charitable, religion includes all forms of religion which accept, as the exempted nonconformists may be said to have done, the fundamental doctrines of the Christian faith.

But subsequent decisions enable us to go a step further. The Unitarian Relief Act, 1813 (as I may call it) (1), repeals so much of the Toleration Act, 1688, as enacts that nothing therein contained should extend to give any ease or benefit to persons denying the Trinity, and also so much of the Blasphemy Act as relates to persons denying the Trinity. As from the passing of this Act trusts for the religious purposes of Unitarians have always been held good charitable trusts. The repeal of the Blasphemy Act, which did not itself affect the common law, could not alter the common law. These decisions proceed, therefore, on the footing that a mere denial of the Trinity is not criminal. The Unitarian Relief Act containing no provisions as to trusts, they also proceed on the footing that, but for the statutory penalties to which, prior to the Act, persons who denied the Trinity had been subject, a trust for a religion which rejects the doctrine of the Trinity would have been a good charitable trust. A denial of or attack on the doctrine of the Trinity can never, therefore, have been either actually illegal or contrary to the policy of the law.

Further, whatever may have been the case with the Unitarians of 1813, it is quite certain that in more recent years many Unitarians have not only denied the Trinity but have disputed the "Divine authority" of the Old and New Testament in the sense in which that expression is ordinarily used by persons professing the Christian faith. If there is any doctrine vital to Protestant Christianity it would appear to be that of the Divine authority of the Scriptures, and yet in the case of trusts for the religion of Unitarians no distinction has been drawn between those who do and who do not hold this doctrine. It would seem to follow that a trust for the purpose of any kind of monotheistic theism would be a good charitable trust

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(1) 153 Geo. 3, c. 160.

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The Roman Catholic Relief Act, 1832, and the Jewish Relief Act, 1846, expressly validate trusts for the purposes of the Roman Catholic and Jewish religions. No inference can, therefore, be drawn from any decision since they were placed on the Statute-book. But the case of *De Costa v. De Paz* (1), to which I have already referred, is important in this connection. It was decided before the Jewish Relief Act, and Lord Hardwicke held that a trust for the purpose of the Jewish religion was bad on the ground that it was against Christianity and Christianity was the law of the land. It would have been enough to say it could not be enforced on the ground that the practice of the Jewish religion was subject to statutory penalties. On further consideration, however, Lord Hardwicke upheld the gift on the ground that it was for a charitable purpose and that the testator's general charitable intention ought not to be defeated because the fund could not be applied in the way the testator desired. He left it to the Crown to direct a *cy près* application. As I have already said, the Crown applied it for the purposes of the Christian religion. This case seems to show that the Jewish religion is within the equitable rule and that, apart from the statutory penalties, there was never anything inconsistent with public policy in enforcing a trust for the benefit of the Jewish religion. *De Costa v. De Paz* (1) was followed in *Isaac v. Gompertz*. (2) Lord Thurlow there held that a trust for the maintenance of a Jewish synagogue was charitable, and directed an application to the Crown with a view to its *cy près* application.

My Lords, apart from the question of religious trusts there is one authority directly in point. In *Pare v. Clegg* (3) the plaintiff sued the trustees of a friendly society known as the Rational Society for moneys lent to the society. The trustees objected that the society had illegal objects and that the money could not be recovered on that account. The objects of the society included the promotion of the following propositions:—

“(1.) That all facts yet known to man indicate that there is an external or internal cause of all existences by the fact of their

(1) 2 Swanst. 487, note (a); (2) (1786) cited in 7 Ves. 61.
Amb. 228. (3) 29 Beav. 589, 596.

existence: that this all-pervading cause of motion and change in the universe is the power which the nations of the world have called God, Jehovah, Lord, &c.; but that the facts are yet unknown to man which define what that power is.

“(2.) That all ceremonial worship by man of this cause, whose qualities are yet so little known, proceeds from ignorance of his own nature, and can be of no real utility in practice; and that it is impossible to train men to become rational in their feelings, thoughts or actions until all such forms shall cease.”

These propositions are clearly anti-Christian. If they point to religion at all, it is a kind of negative deism, if I may use that expression, and not a theistic religion. Nevertheless it was held by Romilly M.R. that they contained nothing “irreligious or immoral,” and that, therefore, the defence failed. It follows that he cannot have thought that there was anything against public policy in advocating deism or (a fortiori) any form of monotheism.

This conclusion is further borne out by *Thompson v. Thompson*. (1) There the trust was to pay a stipend to some literary man who had not been successful in his career and who would assist in extending the knowledge of the doctrines to which the testator had devoted his attention and pen. This was held to be a charitable gift, provided the testator’s writings, published or unpublished, contained nothing “irreligious, illegal or immoral.”

My Lords, in my opinion the authorities I have mentioned are sufficient to establish that the first object of the society’s memorandum is not open to objection as contrary to the policy of the law. It is not illegal, for it does not involve blasphemy. It is not irreligious, for it is at any rate consistent with that negative deism which was held not to be irreligious in *Pare v. Clegg*. (2) It is not immoral or seditious. It is, no doubt, anti-Christian, but, to adopt the words of Coleridge J. in *Shore v. Wilson* (3), “There is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical

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(1) 1 Coll. 381.

(2) 29 Beav. 589.

(3) 9 Cl. & F. 355, 539.

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rule, is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching, or believing, however erroneous, are maintained."

My Lords, I am glad to be able to come to this conclusion. It would be a serious matter for your Lordships' House, unless clearly compelled by authority, to lay down a principle which would not only lead to the anomalies pointed out by Lord Buckmaster, but would preclude the Courts of this country from giving effect to trusts for the purposes of religions which, however sacred they may be to millions of His Majesty's subjects, either deny the truth of Christianity or, at any rate, do not accept some of its fundamental doctrines.

On all these grounds I think the appeal fails.

LORD SUMNER. (1) My Lords, the question is whether an anti-Christian society is incapable of claiming a legacy, duly bequeathed to it, merely because it is anti-Christian. The certificate proves that the incorporation is that of the statutory number of persons in accordance with the formalities of the Act, that "all the requisitions of this Act in respect of registration have been complied with" (Companies Act, 1862, s. 18), and that the respondent society is a complete person in law. It does not prove that all the memorandum powers are lawfully exercisable.

What then are the society's character and powers? For them we must look at the memorandum, and then the question will be, Does the law permit their exercise?

Paragraph 3 (A) gives its principle. The first part is stated both as a positive proposition, namely, that human conduct should be based upon natural knowledge, and as a negative proposition, namely, that it should not be based on supernatural belief. The second part is expressed only positively, namely, that human welfare in this world is the proper end of all thought and action, but equally the negative of this proposition is implied. Since "human welfare is the proper end of all thought and action," any object save the welfare of mankind in this world (for example, the glory of God) cannot be a proper end for any thought or action at all. The powers taken in the subsequent paragraphs are ancillary

(1) Read by Lord Dunedin.

to the first and some are so expressed. It is true that object (K) is "to publish books," and object (L) "to assist by votes of money other societies or associated persons or individuals who are specially promoting any of the above objects," but are we to say that this company has among its memorandum powers the publication of Bibles and Prayer Books, the subvention of Bible societies, and the doing of all lawful things conducive to the attainment of such objects, such as building a mission-hall for reading the Bibles and offering the prayers? If the memorandum is to be so construed it is decisive of the case, for I agree that this gift is not an imperfect gift nor impressed with any trust in the donee's hands, and a donee who sometimes acts legally and sometimes illegally cannot be deprived of his legacy for fear he might follow the evil and eschew the good. It is not a question of hoping for the best, as was argued; the law must presume that what is legal will be done, if anything legal can be done under the memorandum. Thus one just man may save the city. To my mind, if the memorandum be construed as it is by my noble and learned friend, who has immediately preceded me, any consideration of blasphemy or Christianity or their legal position is irrelevant, for the appeal fails without it, and before we come to it. I think we should look at the substance and that all the paragraphs should be construed as if they concluded with the words "for the purposes and on the principle stated in paragraph (A)." Surely a society incorporated on such a principle cannot be supposed, as a matter of construction, to exercise ancillary powers on other principles or for independent purposes. Of course, it must be assumed that the powers taken are to be used, if possible, for lawful ends; for example, to subsidize a blaspheming lecturer would be an ultra vires act, and those who so disbursed the company's money would be personally liable to refund it, apart from aiding and abetting; but as I take the memorandum to be that of a society deliberately and entirely anti-Christian, in which opinion I believe the shareholders themselves would agree, I am constrained to deal with the question, What if all the company's objects are illegal per se? For I should be loth to dispose of this case on the narrow ground that, even if all its other objects are illegal, the company in law can always wind up and so dispose of its funds.

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If the respondents are an anti-Christian society, is the maxim that Christianity is part of the law of England true, and, if so, in what sense? If Christianity is of the substance of our law, and if a Court of law must, nevertheless, adjudge possession of its property to a company whose every action seeks to subvert Christianity and bring that law to naught, then by such judgment it stultifies the law. So it was argued, and if the premise is right, I think the conclusion follows.

It is not enough to say with Lord Coleridge C.J. in *Ramsay's Case* (1) that this maxim has long been abolished, or with my noble and learned friend the Master of the Rolls in the Court below that "the older view," based on this maxim, "must now be regarded as obsolete." If that maxim expresses a positive rule of law, once established, though long ago, time cannot abolish it nor disfavour make it obsolete. The decisions which refer to such a maxim are numerous and old, and although none of them is a decision of this House, if they are in agreement and if such is their effect, I apprehend they would not now be overruled, however little Reason might incline your Lordships to concur in them. In what sense, then, was it ever a rule of law that Christianity is part of the law?

The legal material is fourfold: (1.) statute law; (2.) the criminal law of blasphemy; (3.) general civil cases; (4.) cases relating to charitable trusts. From statute law little is to be gleaned. During the sixteenth century many Acts were passed to repress objectionable doctrines, but plainly statutes were not needed if the common law possessed an armoury for the defence of Christianity as part and parcel of itself. Indeed, who but the King in Parliament could then say whether the Christianity, which for the time being formed part of the common law, was the Christianity of Rome or of Geneva or of Wittenberg? Certainly the Courts could not.

After the Revolution of 1688 there were passed the Toleration Act to give "some ease to scrupulous consciences in exercise of religion," which, upon conditions, relieved certain dissenters (Papists and those who denied the Trinity excepted) from the operation of various existing statutes, and the Blasphemy Act,

(1) 48 L. T. 733, 735; 15 Cox, C. C. 231, 235.

which recites that "many persons have of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion . . . and may prove destructive to the peace and welfare of this kingdom." That the Blasphemy Act simply added new penalties for the common law offence of blasphemy, when committed under certain conditions, was held by Lord Hardwicke in *De Costa v. De Paz* (1) and by the Court of King's Bench in *Richard Carlile's Case* (2), and Lord Eldon in *Attorney-General v. Pearson* (3) said that the Toleration Act left the common law as it was and only exempted certain persons from the operation of certain statutes. Such, indeed, is the clear language of the statutes, nor can the fact that persons are singled out for special punishments who deny the Godhead of the Three Persons of the Trinity, the truth of the Christian religion, and the Divine authority of the Holy Scriptures, or who maintain that there be more gods than one, be accepted as showing that the common law offence of blasphemy consists in such denials and assertions and in nothing else. Later Acts have relieved various religious confessions from the burthen of the Blasphemy Act and other statutes, but, except in so far as they deal with charitable trusts for the purposes of such confessions, on which I do not now dwell, they seem to carry the present matter no further.

The common law as to blasphemous libels was first laid down after the Restoration, and here the statement that Christianity is part of the law is first found as one of the grounds of judgment. Earlier opinions of the same kind are curiously general in character. In *Bohun v. Broughton* (4), on a quare impedit, it is said "a tielx leis que ils de Saint Eglise ont en ancien Scripture, covient a nous a doner credence ; car ceo common ley sur quel tous man[iere]s leis sont fondes." Again in the "Doctor and Student" (dialogue 1, chs. 5, 6, and 7) three successive chapters state the grounds of the law of England—the first, the law of reason ; the second, the law of God ; and the third, the usage and custom of the realm. When Lilburne was on his trial in 1649 (5) he complained that he was not

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(1) 2 Swanst. 487, note (a);
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(3) (1817) 3 Mer. 353, 398, 399.

(4) Y. B. 34 Hen. 6, fo. 40.

(2) 3 B. & Al. 161.

(5) (1649) 4 St. Tr. 1269, 1307.

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allowed counsel and appealed to the judges "to do as they would be done by." "You say well," replied Lord Keble. "The law of God is the law of England." But all the same, Lilburne had to do the best he could for himself. A passage from Lord Coke may also be quoted. Brooke J. had once observed casually (Y. B. 12 Hen. 8, fo. 4) that a pagan could not have or maintain any action, and Lord Coke in *Calvin's Case* (1), founding himself on this and on St. Paul's Second Epistle to the Corinthians (ch. 6, v. 15), stated that infidels are perpetui inimici, and "a perpetual enemy cannot maintain any action or get anything within the realm." Of this Willes C.J. in *Omichund v. Barker* (2) observes: "Even the devils themselves, whose subjects he (Lord Coke) says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits." Evidently in this interval the spirit of the law had passed from the Middle Ages to modern times. So far it seems to me that the law of the Church, the Holy Scriptures, and the law of God are merely prayed in aid of the general system or to give respectability to propositions for which no authority in point could be found.

At the beginning of the seventeenth century a considerable change of procedure took place in reference to religion. Legate was burnt at Smithfield in 1612 upon a writ de haeretico comburendo, and another heretic, named Wightman, at Lichfield about the same time, but they were the last persons to go to the stake in this country pro salute animae. No doubt this process was moribund. Before the Restoration the Court of Star Chamber and the Court of High Commission had been suppressed, and at length, by the statute, 29 Car. 2, c. 9, the writ de haeretico comburendo itself was abolished with all process and proceedings thereupon and all punishment of death in pursuance of any ecclesiastical censures. It is to be noted that the Act, in saving the jurisdiction of the Ecclesiastical Courts over "atheism, blasphemy, heresy, or schism," distinguishes blasphemy from the profession of false doctrines, whether atheistical or heretical. The time of Charles II. was one of notorious laxity both in faith and morals, and for a time it seemed as if the old safe-

(1) (1608) 7 Rep. 17a.

(2) (1745) Willes, 538, 542.

guards were in abeyance or had been swept away. Immorality and irreligion were cognizable in the Ecclesiastical Courts, but spiritual censures had lost their sting and those civil Courts were extinct, which had specially dealt with such matters viewed as offences against civil order.

The Court of King's Bench stepped in to fill the gap. In 1663 Sir Charles Sedley was indicted for indecency and blasphemy. (1) The indecency was so gross that little stress was laid on the blasphemy, which was probably both tipsy and incoherent. The Court told the prisoner that they would have him know that, although there was no longer any Star Chamber, they acted as *custos morum* for all the King's subjects, and it was high time to punish such profane actions, contrary alike to modesty and to Christianity.

Then follows *Taylor's Case* (2) in 1675, when the indictment was for words only, though ribald and profane enough. This is the earliest trial for blasphemy. *Adwood's Case* (3) in 1617 is not an instance. It is like *Traske's Case* (4), where the matter in hand was the making of conventicles as tending to sedition. The indictment in *Taylor's Case* (2) is given in Tremaine's *Placita*, p. 226, and shows that the charge was not confined to the fact that Taylor's language was contrary to true religion, but that it was considered dangerous to civil order, for it concludes: "Ad grave scandalum professionis verae Christianae religionis in destructionem Christianae gubernationis et societatis . . . ac contra pacem dicti domini regis."

Now *Taylor's Case* (2) is the foundation-stone of this branch of the law, and for a century or so there is no sign of carrying the law beyond it. The case repays scrutiny. The objection that the offence was an ecclesiastical one lay on the very face of the words charged, and in directing the jury Hale C.J. found it necessary to show why it was also a civil offence. He said that such kind of wicked, blasphemous words, though of ecclesiastical cognizance, were not only an offence to God and religion, but a crime against the laws, State, and Government, and "therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved." (5) It is true that he added that Christianity was

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(1) (1663) 1 Sid. 168; 17 St.
Tr. 155.

(2) 1 Vent. 293.

(3) (1617) 2 Roll. Abr. 78.

(4) (1618) Hob. 236.

(5) 1 Vent. 293; 3 Keb. 607, 621.

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parcel of the laws of England, "and therefore to reproach the Christian religion is to speak in subversion of the law," but this does not really enlarge the previous statement. Speaking in subversion of the law, without more, in the sense of saying that particular laws are bad and should be mended, has never been a criminal offence, and agitating against them has often led on to fortune. *Woolston's Case* (1), in 1728, supplies the completion of the doctrine. Upon a motion in arrest of judgment the Court followed *Taylor's Case* (2) as settled law. The argument was that Woolston's crime, if any, was of ecclesiastical cognizance (he was a clergyman who joked about the miracles), and that "mere difference of opinion is tolerated by law." Lord Raymond's answer was, "I would have it taken notice of, that we do not meddle with any differences in opinion, and that we interpose only where the very root of Christianity itself is struck at. . . . To say, an attempt to subvert the established religion is not punishable by those laws upon which it is established, is an absurdity." True it is that the last words somewhat invert Lord Hale's reasoning, for they seem to treat an attempt to subvert the established form of Christianity (not any other) as an offence, because it attacks the creature of the law, not because that form is the basis of the law itself and the bond of civilized society. At any rate the case leaves untouched mere differences of opinion, not tending to subvert the laws and organization of the realm.

Curl's Case (3), heard about the same time, was a case for publishing an obscene libel, but is of some incidental importance. The Courts were chary of enlarging their jurisdiction in this regard, and in Queen Anne's time judgment had been arrested in such a case for supposed want of precedent, and the offence was treated as one for ecclesiastical cognizance only. On a motion for arrest of the judgment on *Curl* it was argued that the libel, being only contra bonos mores, was for the spiritual Courts. The motion was refused, the Chief Justice saying: "If it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offence." He said, too, "religion is part of the common law," but Probyn J. clears this up, adding, "It is punishable at common law

(1) Fitzg. 64; 2 Str. 834.

(2) 1 Vent. 293.

(3) (1727) 2 Str. 788; 1 Barn,

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as an offence against the peace in tending to weaken the bonds of civil society."

At the end of the eighteenth and beginning of the nineteenth centuries various publishers of Paine's "Age of Reason" were prosecuted. The words indicted were chosen for their scoffing character, and indeed are often really blasphemous, but the idea throughout is that the book was the badge of revolution and tended to jeopardize the State. Thus in the trial of Williams (1) Ashhurst J., passing sentence on him in the Court of King's Bench, stated the ground of this offence thus: "All offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England."

If later cases seem to dwell more on religion and less on considerations of State, I think, when examined, they prove to be of small authority. In *Waddington's Case* (2) there seems to have been little argument, and no decisions were cited. *Rex v. Davison* (3) decides in effect that contempt of God in Court may be also contempt of Court. In 1838 Alderson B. told a York jury (*Reg. v. Gathercole* (4)) that "a person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country." The defendant, in fact, had not made any general attack on Christianity, but, being a Protestant clergyman, had foully aspersed a Roman Catholic nunnery. Whether this strange dictum was material or not, and whether it is right or not (and Baron Alderson's is a great name), it only shows that the gist of the offence of blasphemy is a supposed tendency in fact to shake the fabric of society generally. Its tendency to provoke an immediate

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(1) 26 St. Tr. 653, 715.

(2) 1 B. & C. 26.

(3) (1821) 4 B. & Al. 329.

(4) (1838) 2 Lew. 237, 254.

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Hetherington's Case (1) was a motion in arrest of judgment. Even here, alongside of the propositions that the Old Testament contains the law of God, and that "it is certain that the Christian religion is part of the law of the land" (per Patteson J.), we find Lord Denman C.J. saying: "As to the argument, that the relaxation of oaths is a reason for departing from the law laid down in the old cases, we could not accede to it without saying that there is no mode by which religion holds society together but the administration of oaths; but that is not so, for religion . . . contains the most powerful sanction for good conduct." *Reg. v. Moxon* (2) is of small authority. Later prosecutions add nothing until Lord Coleridge's direction to the jury in *Reg. v. Ramsay and Foote*. (3) For thirty years this direction has been followed, nor was it argued by the appellants that the publication of anti-Christian opinions, without ribaldry or profanity, would now support a conviction for blasphemy. It is no part of your Lordships' task on the present occasion to decide whether Lord Coleridge's ruling was or was not the last word on the crime of blasphemy, but the history of the cases and the conclusion at present reached go to show that what the law censures or resists is not the mere expression of anti-Christian opinion, whatever be the doctrines assailed or the arguments employed.

It is common ground that there is no instance recorded of a conviction for a blasphemous libel, from which the fact, or, at any rate, the supposition of the fact, of contumely and ribaldry has been absent, but this was suggested to be of no real significance for these reasons. Such prosecutions, it was said, often seem to be persecutions, and are therefore unpopular, and so only the gross cases have been proceeded against. This explains the immunity of the numerous agnostic or atheistic writings so much relied on by Secularists. All it really shows is that no one cares to prosecute such things till

(1) 5 Jur. 529, 530; 4 St. Tr. (N.S.) 563. (3) 15 Cox, C. C. 231; Cab. & E. 126.

(2) 4 St. Tr. (N.S.) 693.

they become indecent, not that, decently put, they are not against the law. Personally I doubt all this. Orthodox zeal has never been lacking in this country. The Society for Carrying into Effect His Majesty's Proclamations against Vice and Immorality, which prosecuted Williams in 1797, has had many counterparts both before and since, and as anti-Christian writings are all the more insidious and effective for being couched in decorous terms, I think the fact that their authors are not prosecuted, while ribald blasphemers are, really shows that lawyers in general hold such writings to be lawful because decent, not that they are tolerable for their decency though unlawful in themselves. In fact, most men have thought that such writings are better punished with indifference than with imprisonment.

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I may now turn to decisions in civil cases other than cases of charitable trusts. They are at least inconclusive. In *Murray v. Benbow* (1) Byron's "Cain" was in question. Lord Eldon read it, and, as it happened, was able to compare it with "Paradise Lost." "You have alluded," he says, "to Milton's immortal work. It did happen in the course of last Long Vacation, amongst the sollicitae jucunda (2) oblivia vitae, I read that work from beginning to end. . . . Taking it altogether, it is clear that the object and effect were not to bring into disrepute, but to promote the reverence of our religion." So judging "Cain" he doubted, and, as an injunction was matter of discretion and not of right, he refused an injunction till the plaintiff's right had been established at law. According to Smiles's John Murray (i., 428) the necessary action was brought, a jury upheld the copyright, and on a subsequent application the injunction was granted. About the same time, however, in 1822, in *Lawrence v. Smith* (3) an injunction had been obtained ex parte to restrain the issue of a pirated edition of the plaintiff's "Lectures on Physiology." As the lectures seemed to him to question the immortality of the soul, Lord Eldon dissolved it as a matter of discretion and in the absence of any judgment deciding the right at law, and observed that "the law does not give protection to those who contradict the Scriptures," a dictum which, in its full width,

(1) 4 St. Tr. (N.S.) 1409, 1410. Lord Eldon at all events was not

(2) [Two false spellings for which answerable are here corrected.]

(3) Jac. 471.

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imperils copyright in most books on geology. In the present case the respondents do not appeal for protection to the Court's discretion, but vindicate a right of property, as clearly established as if there were a verdict. Again in *Pare v. Clegg* (1) Lord Romilly M.R. gave judgment against the defendant, remarking that the society which he represented, though based on irrational principles, was not formed "for the purpose of propagating irreligious and immoral doctrines," and so was liable. This is not authority for saying generally that a society formed for the purpose of propagating irreligious doctrines could not be made to pay its debts. At most they must be such irreligious doctrines as the law forbids, and that leaves open the whole question what it is that the law forbids. Whether or not it is an authority directly in favour of the respondents I am not prepared to say. *Cowan v. Milbourn* (2) has long stood unchallenged. The judges meant to decide no new law, but to follow and apply the passages cited from Starkie on Libel. I cannot follow the observation of Lord Coleridge C.J. in *Ramsay's Case* (3) that the judgments, or at any rate that of Bramwell B., turn on the effect of the statute of William III. The rooms had been engaged for two purposes. One was for a tea party and ball in memory of Tom Paine, and the other was the delivery of the lectures in question. As to the first, the recorder left the case to the jury, who gave a farthing damages for the frustration of this, dismal, but no doubt harmless, festivity. As to the other, some fear of a breach of the peace may have existed, for intervention by the chief constable is mentioned in the *Law Reports*, but not in the *Law Journal*, *Law Times*, or *Weekly Reporter*. The plea (4) alleged a purpose "to use the said rooms for certain irreligious, blasphemous, and illegal lectures," but they had not been delivered, and no indictable words could have been assigned. The recorder refused to leave the question of purpose to the jury with regard to the lectures. The argument in moving for the rule was that the case should have gone to the jury, for the placards per se did not prove an intention to insult or mislead, and temperate discussion of such subjects is lawful. Clearly the recorder had ruled that under such titles no

(1) 29 Beav. 589.

(3) 15 Cox, C. C. 231; Cab. & E.

(2) L. R. 2 Ex. 230.

126.

(4) 16 L. T. 290.

lecture could be delivered that would not be unlawful. It is upon such a presentation of the case and, I suppose, on such a ruling at the trial that Kelly C.B. said "Such a lecture cannot be delivered . . . without blasphemy and impiety," and from this his colleagues do not dissent. I do not think that the Court were finding in the placards and the chief constable a quia timet justification for the defendant's breach of contract. Their ground was that the hiring was and could only be for an illegal object, and therefore the contract could not be enforced. The distinction is well settled between things which are illegal and punishable and things which, though not punishable, are illegal so as not to support a contract for good consideration. Prostitution is one of the common examples. Bramwell B. evidently thought that Secularism was another. But this reasoning postulates that, whatever lectures were actually delivered, they could not but be unlawful. Lectures, lawful because decently expressed, could, however, have been delivered under those titles, and therefore the hiring was not conclusively shown to have been for an unlawful purpose and void. The case should have gone to the jury. The alternative view of the case must be that the whole Court held that any general denial or dispute of Christian faith is unlawful, which had not been held at law before. From this it would follow that a person, whose business it was to publish and sell anti-Christian books, need neither pay his printer's bill nor the poor rates for his shop, a proposition which is refuted by stating it, and from which at least two members of the Court in *Cowan v. Milbourn* (1) would have recoiled. I think the decision was wrong.

As to *De Costa v. De Paz* (2), Lord Hardwicke is reported as saying that there is a great difference between laying penalties on persons for the exercise of their religion and establishing them by acts of the Court. So here I think there is a great difference between laying civil disabilities on a man for the profession of his irreligion or on a company for the exercise of its memorandum powers, however contrary to Christianity, and establishing them by the act of the Court. The appellants' claim is that the Court should deny the respondent company's right to receive this money on the ground that it cannot make any lawful use of it, not that it

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(1) L. R. 2 Ex. 230.

(2) 2 Swanst. 487, note (a), 490, n.; Amb. 228.

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should establish the money in the company's hands as a charitable trust for un-Christian objects. It is true that Lord Hardwicke goes on to say that "the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land . . . for the constitution and policy of this realm is founded thereon," and there are a good many other cases of the same kind, especially *Briggs v. Hartley* (1), in which similar language is used; but charitable trusts form a particular and peculiar branch of the law, and I do not think that the reasoning, and still less the remarks, contained in those cases bear usefully on general principles. However right it may be to refuse the aid of the law in establishing a trust for Secularist purposes, I cannot see why a Secularist is not to receive a gift of money because he is a Secularist and says so. I will not further pursue the cases cited on charitable trusts, nor could I presume to add to what has fallen from my noble and learned friend Lord Parker of Waddington.

My Lords, with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England" is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: "No man can be expected to be faithful to the authority of man, who revolts against the Government of God." One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best C.J. once said in *Bird v. Holbrook* (2) (a case of injury by setting a spring-gun): "There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England"; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. "Thou shalt not steal" is part of our law. "Thou shalt not commit adultery" is part of our law, but another part. "Thou shalt love thy neighbour as thyself" is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its prin-

(1) 19 L. J. (Ch.) 416.

(2) (1828) 4 Bing. 628, 641.

ciples, with equal justice and equally good government, in heathen communities, and its sanctions, even in Courts of conscience, are material and not spiritual.

Frequently as the proposition in question appears in one form or another, it is always as something taken for granted and handed down from the past rather than as a deliberate and reasoned proposition. It constantly has been used in charging juries as to unmistakably scurrilous words, where there was neither opportunity nor occasion for defining the limits of legitimate religious and irreligious opinion. I question if the foundations of the criminal law of blasphemous libel were ever fully investigated in any Court before *Ramsay's Case*. (1) Even then Lord Coleridge passed over numerous decisions. To be sure his omissions were faithfully dealt with soon afterwards by Stephen J., one of his own puisnes, in a popular periodical, and this paper your Lordships allowed Mr. Talbot to read as part of his argument, to which, nevertheless, it added nothing either in learning or in cogency. Such observations, too, have often been employed by judges of first instance in cases relating to charitable trusts, where there was equally little need for any analysis of the proposition or for discussion, either historical or juridical, of its implications. It is fairly clear, too, that men of the utmost eminence have thought, and said advisedly, that mere denials of sundry essentials of the Christian faith are indictable as such. Hawkins, in his Pleas of the Crown, bk. i., ch. 26, p. 358, says that "all blasphemies against God; as denying His being" as well as "all profane scoffing at the Holy Scripture" are punishable offences, and adds as the reason for punishing the latter that offences of this nature "tend to subvert all religion or morality, which are the foundation of government." Blackstone, bk. iv., p. 59, describes a class of "offences more immediately against God and religion" consisting in "blasphemy against the Almighty, by denying his being or providence" or "contumelious reproaches of our Saviour Christ," and refers to this head "all profane scoffing at the holy scripture or exposing it to contempt and ridicule." Probably few great judges have been willing to go further in questions of religious liberty than Lord Mansfield in his eloquent address

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to this House in *Evans v. Chamberlain of London*. (1) Yet there he says : " The eternal principles of natural religion are part of the common law : the essential principles of revealed religion are part of the common law ; so that any person reviling, subverting, or ridiculing them may be prosecuted at common law." Again, the very careful Commissioners on the Criminal Law, of whom Serjeant Starkie was one and Sir William Wightman another, observe in their Sixth Report, p. 85 : " Although the law distinctly forbids all denial of the being and providence of God, or the truth of the Christian religion . . . it is only where irreligion assumes the form of blasphemy, in its true and primitive meaning, and has constituted an insult both to God and man, that the interference of the criminal law has taken place." Nevertheless it seems to need no citation of authorities (the opinions of the majority of the Judges in your Lordships' House in *Shore v. Wilson* (2) having been fully discussed) to show that a temperate and respectful denial, even of the existence of God, is not an offence against our law, however great an offence it may be against the Almighty Himself, and, except for *Cowan v. Milbourn* (3), it has never been decided outside of the region of charitable trusts that such a denial affects civil rights. I cannot bring myself to think that it does so. What, after all, is really the gist of the offence of blasphemy, or of its nature as a cause of civil disability ? Ribaldry has been treated as the gist, which must be a temporal matter ; as between creature and Creator, how can the bad taste or the provocative character of such a denial come into question ? The denial itself, not the mode of it, must be what merits the Divine anger : but that is an offence against God. Our Courts of law, in the exercise of their own jurisdiction, do not, and never did that I can find, punish irreligious words as offences against God. As to them they held that *deorum injuriæ dis curæ*. They dealt with such words for their manner, their violence, or ribaldry, or, more fully stated, for their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society, and to be a cause of civil strife. The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable

(1) 2 Burn's Ecc. Law, p. 218 ; (2) 9 Cl. & F. 355.
16 Parly. History, pp. 315, 317. (3) L. R. 2 Ex, 230.

or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience. If these considerations are right, and the attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State and not on the doctrines or metaphysics of those who profess them, it is not necessary to consider whether or why any given body was relieved by the law at one time or frowned on at another, or to analyse creeds and tenets, Christian and other, in which I can profess no competence. Accordingly I am of opinion that acts merely done in furtherance of paragraph 3 (A) and other paragraphs of the respondents' memorandum are not now contrary to the law, and that the appeal should be dismissed.

LORD BUCKMASTER. My Lords, the terms of the will of the testator and the circumstances leading up to this appeal do not demand

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close attention, for according to the appellants' argument the whole question to be decided depends upon the meaning of the 3rd article of the memorandum of association of the respondent company, and upon the determination of whether this article, properly construed, renders the real object of the respondent company either criminal or illegal as contrary to the common law. The point of construction must be decided by considering the fair meaning of the language used and without resort to external means. Neither the documents preliminary to the incorporation of a company registered with a memorandum of association, nor the action of directors after a company has been formed, can properly be received in evidence for the purpose of determining what the objects of the company may be.

Clause 3, sub-head (A) of the memorandum defines the main object of the company in these words: "To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action."

Upon this follow a series of objects which in themselves it is not suggested are obnoxious to the law, while the last sub-head of the clause is in general terms and gives power "to do all such other lawful things as are conducive or incidental to all or any of the above objects." Without this last provision the true construction of the memorandum would involve the view that if the defined objects could be attained, either by lawful or by unlawful means, it was only those that were lawful that were permitted. But the latter provision makes the meaning quite plain.

This conclusion, however, does not affect the appellants' case, which depends upon the assertion that there are no lawful ways by which the objects of the society can be carried out. It is said that the true meaning of the memorandum is to encourage the propagation of doctrines directly contrary to the Christian faith—doctrines that are inimical to the central principle of Christianity and incapable of reconciliation with any essential portion of its creeds. Warrington L.J., indeed, thought that to promote such objects would be to promote atheism, and as this may be a material matter it is necessary to state the reasons why I am unable to accept this view.

Natural law may, as it seems to me, be properly regarded as part of the Divine purpose, revealed through the instrument of reason; and if natural knowledge be accepted, as on this assumption it must, as equivalent to the truth, then to take that as the basis of human conduct, as the first part of the clause directs, does not, to my mind, necessarily mean that a belief in God is thereby excluded.

The latter part of the clause, which says that human welfare in this world is "the proper end of all thought and action," is more difficult. That human welfare is a proper end of thought and action few would dispute—it is the end on which the noblest minds have concentrated their highest effort; even if it be regarded as the sole object, I can conceive it being steadfastly pursued by people who possessed a firm belief in a supreme invisible Power using the instrument of man's agency to accomplish the Divine will. That this clause of the memorandum defines an object contrary to the generally accepted conception of the Christian faith is, I think, assented to by all who have heard this case, and from this view I am not prepared to dissent. It is not necessary, and if unnecessary it is certainly not desirable, to attempt a definition of what the law would regard as the essential features of that faith. It is sufficient to say that the respondent company has as its main object the propagation of doctrines hostile to the Christian religion, and the question to be determined is whether it is in consequence an illegal association—incapable of receiving or holding property.

This objection is stated by Mr. Talbot (to whom I am much indebted for his research and for the matter and manner of his argument) by saying that such doctrine offends, in the first case, against the common law, which prohibits blasphemy. He regards the essence of legal blasphemy as the publication of matter denying or hostile to the Christian faith, and he rejects the interpretation put upon it by Erskine J. in *Shore v. Wilson* (1), by Lord Denman C.J. in *Reg. v. Hetherington* (2), and by Lord Coleridge C.J. in *Reg. v. Ramsay* (3), each of whom states the law so as to limit the offence to the act of denial associated with ribald, contumelious, or scurrilous language

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(1) 9 Cl. & F. 355, 524.

(2) 4 St. Tr. (N.S.) 563, 590.

(3) 15 Cox, C. C. 231.

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or conduct. I am unable to accept the appellants' contention as correct. To do so would involve the conclusion that all adverse critical examination of the doctrines of Christianity—even though it was conducted with the utmost reverence—was a blasphemous publication which rendered the writer liable to criminal proceedings. It would, indeed, be hard to find a worse service that could be done to the Christian faith than to prevent people from explaining and inviting an answer to the reasoned convictions that led them to question its truth.

The common law which forbids blasphemy is to be gathered from usage and custom, and it is a striking fact that with one possible exception—the case of *Rex v. Woolston* (1)—every reported case upon the matter, beginning with *Rex v. Taylor* (2), and continuing down to *Reg. v. Ramsay* (3) and *Rex v. Boulter* (4), is a case where the offence alleged was associated with, and I think constituted by, violent, offensive, or indecent words.

That it was considered necessary to report the earlier cases as precedents affords, to my mind, a strong presumption that it was the character of the attack which constituted the crime, for if the law was well recognized as forbidding any adverse criticism, the cases where such criticism was coarse and disgraceful would be too plain to merit preservation. In my opinion, therefore, the common law of England does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated, and whether in each case this is a crime is a question for the jury, who should be directed in the words of Erskine J. in *Shore v. Wilson* (5), quoted by the Master of the Rolls in his judgment on the present case.

It is then said that, even if this be conceded, the object of the society is illegal, not in the sense that acts done to further its objects would be criminal, but that they are of such a nature as to be incapable of establishing a legal right to receive money for their furtherance. I find it difficult to appreciate this distinction, but I understand the contention to be that Christianity is part of the common law of England, and it must, therefore, be illegal,

(1) Fitzg. 64 ; 2 Str. 834.

(3) 15 Cox, C. C. 231.

(2) 1 Vent. 293.

(4) 72 J. P. 188.

(5) 9 Cl. & F. 524, 525.

even if it were not criminal, for any body of people to promote doctrines that are hostile to its creed. If this argument be carried to its full extent, it will really show that Unitarians, Positivists, Comtists, and other similar religious and ethical bodies, unless relieved by statute, are illegal associations, for the Christianity known to the common law is certainly not Unitarian Christianity, nor is it reconcilable with the doctrines of Comte or Hegel. Again, it would result that editors and publishers would be able to deny payment to contributors and authors whom they had expressly employed to write philosophical and scientific articles or books if it could be decided that the work was anti-Christian, while no one could be compelled to pay for any such books when purchased. Indeed, the doctrine, as it seems to me, would apply to a great deal of classical and scientific literature, and the conditions which would condemn these works might vary from year to year as different views from time to time prevailed.

It is quite right to point out that, if the law be as the appellants contend, these considerations afford an argument for its alteration, but do not prove that it does not exist. If, on the other hand, the law is not clear, it is certainly in accordance with the best precedents so to express it that it may stand in agreement with the judgment of reasonable men.

Apart from the criminal cases already mentioned certain authorities are referred to, which, if correctly decided, do appear to afford support for the appellants' argument. The case of *De Costa v. De Paz* (1), a decision of Lord Hardwicke's, is one of these authorities; and *In re Bedford Charity* (2) is a decision of Lord Eldon's, containing statements to the same effect; and so also is the case of *Briggs v. Hartley*. (3) The first of these was a gift for the purpose of providing a fund to be applied for ever for the reading of the Jewish law and for advancing and propagating the Jewish faith. It was certainly open to argument that this was not a charitable bequest and was consequently void as a perpetuity. But it was not upon this ground that the decision was based; it was held that it was a charity (see the report in Ambler), but that the mode of disposition was such that it could

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(1) 2 Swanst. 487, note (a); (2) 2 Swanst. 470.

Amb. 228.

(3) 19 L. J. (Ch.) 416.

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not take effect. It is true that in the report in 2 Swanston the reason why the gift to the specific object of the charity was held inoperative was because it was contrary to the Christian religion, but in Ambler it is stated that the objects were contrary to the "established" religion, and as at that date the statutory disabilities under which the adherents of the Jewish faith suffered had not been removed this might have been sufficient for the purpose of the case; indeed, on any other view it is hard to understand why if the whole object was illegal it was supported as a charity at all. I do not, however, propose further to pursue this question, as I have had the advantage of reading Lord Parker's opinion, and with it I am in entire agreement. The second case was merely a question as to whether Jews might enjoy the benefits of a particular charity, and it was held they might not. The last was a legacy for the best essay on Natural Theology treated as a science, and sufficient when so treated and taught to constitute a true, perfect, and philosophical system of universal religion; and it was held bad for no further reason than that it was not consistent with Christianity, but the law was in no way examined or criticized.

In the two earlier cases it was stated that Christianity is part of the law of the land, and the authorities quoted in support of the proposition are the cases of *Rex v. Taylor* (1) and *Rex v. Woolston* (2); but the pronouncements of Lord Hale and Lord Raymond in these cases must be taken in reference to the subject-matter of the case, which, in one instance certainly, and in the other possibly, was a prosecution for scurrilous blasphemy.

If the reasons for the decision in *De Costa v. De Paz* (3) were those urged by the appellants I should not regard them as correct. If a gift to endow any body that propagates doctrines hostile to the generally accepted view of the Christian religion was at any time contrary to the common law, it is, in my opinion, contrary at the present time, and gifts to Unitarians and similar religious bodies for the support and endowment of their religious faith are now void. It is urged in answer to this that the position with regard to Unitarians, as also with regard to Jews, is altered by two statutes—the one 53 Geo. 3, c. 160, and the other 9 & 10 Vict.

(1) 1 Vent. 293.

(2) Fitzg. 64; 2 Str. 834.

(3) 2 Swanst. 487, note (a);
Amb. 228.

e. 59. I am unable to accept this view. The statutory position appears to me to be plain. By the Act of 1 Will. & Mar. c. 18 (generally known as the Toleration Act) it is provided that no penalties shall apply to any person dissenting from the Church of England that shall take the oaths that are specified in 1 Will. & Mar. c. 1 and in 30 Car. 2, stat. 2, and (as to persons in orders) accept the Articles of Religion, excepting Articles 34, 35, and 36, and certain words of the 20th Article. But Papists and those denying the doctrines of the Blessed Trinity as declared in the said Articles of Religion are omitted from the protection of this statute. The penalties from which this statute grants relief are statutory penalties and disabilities, and it left the common law exactly what it was.

The Act known as the Blasphemy Act (9 & 10 Will. 3, c. 32) is really an Act directed against apostates from the Christian faith, and that Act again provides certain penalties, cumulative and severe on second conviction, for any person who, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall by writing or advised speaking deny any one of the Persons of the Holy Trinity to be God, or who shall assert that there are more gods than one, or shall deny the Christian religion to be true. This is a disabling statute still unrepealed, imposing penalties so severe that it is said no prosecution has ever been instituted under its provisions. Its terms, therefore, demand the narrowest and most jealous scrutiny. The fact that it has only incidentally been brought under judicial notice may explain the loose and, as I think, erroneous references made to its effect, as for example by Lord Lyndhurst in *Shore v. Wilson* (1), where he says that "those persons who by preaching denied the doctrine of the Trinity . . . are subject to the penalties of the Act," and again by Bramwell B. in *Cowan v. Milbourn*. (2) This is not accurate; only those persons who had been educated in, or had at any time made profession of, the Christian religion within the realm could incur the statutory penalties.

The Act 53 Geo. 3, c. 160, repeals so much of the Toleration Act as provides that the exemption of the statute shall not extend so as to give its advantage or benefit to persons denying the doctrine

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(1) 19 Cl. & F. 355, 397.

(2) L. R. 2 Ex. 230.

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of the Blessed Trinity, and for the purpose of making this exemption effectual it repeals, as far as was necessary, 9 & 10 Will. 3, c. 32. The statute of 9 & 10 Vict. c. 59 (the Religious Disabilities Act, 1846) provides that persons professing the Jewish religion shall, in respect of their schools, places of religious worship, educational and charitable purposes, and property held by them, be subject to the same laws as His Majesty's Protestant subjects who dissent from the Church of England. This means that they are freed from all disabilities imposed by statute and open to all existing at common law. This is the view expressly stated by Lord Eldon in *Attorney-General v. Pearson* (1), and is in agreement with the decisions in *Rex v. Richard Carlile* (2) and *Rex v. Waddington*. (3)

So far as holding property is concerned Jews are to be regarded as being in the same position as His Majesty's Protestant subjects who dissent from the Church of England. This must be taken to mean that they can hold property; for the common law—whatever its scope—did not specially safeguard what we now know as the Established Church, but the Christian faith. And there was never anything, apart from statutory disabilities, to prevent Protestant dissenters from holding property: *Attorney-General v. Pearson*. (4) Of course, while any particular belief was made the subject of penalty by statute, a gift to further the purpose of that belief would be contrary to the statute law; but when once the statutory disability was removed, unless some disability could be found outside, there could be nothing to hinder the gift of money for the purpose of any such association.

It is this that explains the case of *West v. Shuttleworth* (5), which was a decision on the statute in relief of Roman Catholics similar to that in relief of Jews (2 & 3 Will. 4, c. 115). Now the Roman Catholic religion—whatever views may be taken of the Reformation—was certainly never contrary to the common law; and therefore, when once the statutory prohibitions were taken away, the receipt of money for the general purpose of their faith was not forbidden. In the case of *Shrewsbury v. Hornby* (6) a gift in support of Unitarian doctrine was held

(1) 3 Mer. 353, 405.
(2) 3 B. & Al. 161.
(3) 1 B. & C. 26.

(4) 3 Mer. 353, 409, 410.
(5) 2 My. & K. 684.
(6) 5 Hare, 406.

good, and it is suggested that this was because 53 Geo. 3, c. 160, repealed the common law so far as it affected Protestant ministers. I am unable to find that the statute effects this purpose. If by implication any part of the common law is repealed there would appear to be no particular reason why it should be repealed so as to allow a special class of Protestant dissenters—but not other people—to deny the doctrine of the Holy Trinity. It would, indeed, be strange if the publication of a book, or the delivery of a lecture, would be legal or illegal according to the religious opinion of the person who wrote it, and not according to its contents. If any repeal at all had been effected by these Acts it would, in my opinion, have been the repeal of the whole doctrine had it ever existed; but the true view, in my judgment, is that it did not exist. The common law throughout remains unaffected; and I cannot find any case except *Briggs v. Hartley* (1) where as a necessary step in the decision it is enunciated in terms as wide as are necessary to support the appellants' case. For example, in *Thompson v. Thompson* (2) it was held that a gift will be supported for the encouragement of the general doctrines advocated in a testator's writings if neither atheism, sedition, nor any crime or immorality is to be inculcated. Again, in *Harrison v. Evans* (3) Lord Mansfield defined the common law in these terms: "There never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law." It is unnecessary to determine whether and under what circumstances the promulgation of atheism is illegal, for by "atheism" in this connection I understand a disbelief in one eternal and invisible God, and I have already stated my views that the respondents' objects do not properly include the advocacy of such a doctrine. Blasphemy is constituted by violent and gross language, and the phrase "reviling the Christian religion" shows that without vilification there is no offence.

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(1) 19 L. J. (Ch.) 416.

(2) 1 Coll. 381, 397.

(3) 2 Burn's Ecc. Law, 207, 218.

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I am glad to think that this opinion is supported by the carefully considered and weighty utterances of many learned judges. The case of *Shore v. Wilson* (1), in its actual result, depended upon a question of construction of deeds of trust and upon special facts and, so regarded, the decision could have but little application to other disputes; but when the case was before this House the opinions of the judges were taken on certain questions, and the sixth question was this: "Whether such (i.e., Unitarian) ministers, preachers, widows and persons are in the present state of the law incapable of partaking of such charities or any and which of them."

Erskine J. (p. 525), Coleridge J. (p. 539), Maule J. (p. 509), Williams J. (p. 545), Gurney B. (p. 554), Parke B. (p. 565), and Tindal C.J. (p. 578) all agreed in thinking that they were not. It is true that Coleridge J. based his opinion upon the ground that Unitarians were Christians, but Maule J. stated that there was no authority to show that teaching Unitarian doctrine was contrary to the common law, and Erskine J. stated that it was open to any man "without subjecting himself to any penal consequences soberly and reverently to examine and question the truth of those doctrines which have been assumed as essential to the Christian faith."

There is indeed to be found in certain of these opinions indications of the view expressed in *Rex v. Woolston* (2) that it is not illegal to deny any doctrine of the Christian faith, but that it is to deny them all collectively. I cannot accept this view of the law. The Christianity offences against which are illegal at common law is the Christianity known to the common law, and Unitarian Christianity is opposed to the central doctrine of this faith.

There remains the case of *Cowan v. Milbourn* (3), in which the distinction urged by the appellants is clearly stated by Bramwell B.; but it is equally clear that he misconceived the meaning of the Blasphemy Act, for he based his judgment on the statement that the hirer "proposed to use the rooms for purposes declared by the statute to be unlawful," but, as I have already shown, the statute had no such comprehensive scope.

I am unable to ascertain what is the real reason upon which the distinction is supported. It appears to me that offences against

(1) 9 Cl. & F. 355.

(2) 2 Str. 834.

(3) L. R. 2 Ex. 230.

Christianity, so far as they are recognized by law, are either statutory offences, leading to statutory penalties, or they are criminal offences at common law, punishable by the criminal Courts, and I am unable to see how such offences, if not so punishable, exist at all, or how in this connection an act can be illegal without being the subject of prosecution, for even if it be accepted that Christianity is part of the common law it does not follow that it is illegal to question its wisdom or its truth. The analogy of the cases with regard to restraint of trade and immorality of consideration does not appear to me to be sound. Restraint of trade, though contrary to the common law of England, never was a criminal offence; and, again, acts of immorality, though not criminal, cannot be made a consideration sufficient to support a contract, nor can a contract entered into to further such acts be enforced in the Courts. The latter of these classes of case are those which offend against good morals—the former are those contrary to public policy. The alleged offence in this case is neither one nor the other. The common law of England, in the words of Lord Mansfield, “knows no prosecution for mere opinion,” and if the holding of opinion be not contrary to the common law, I cannot see why its expression should be unlawful, provided such expression be kept within proper limits of order, reverence, and decency. If this be so, a society to propagate such opinions, if properly conducted, is not an illegal society.

I have only to add that, apart altogether from these considerations, I think that the respondents are well founded in arguing that since the company is a legal entity, and as some at least of its objects are on the face of them lawful, there is no ground upon which it is possible to prevent them from receiving money which has been the subject of a bequest in their favour.

I cannot accede to the argument that the later purposes in the memorandum, which, taken alone, must be regarded as proper and lawful objects, become unlawful because they are associated with the first purpose of the memorandum. If an unequivocal act be lawful in itself the motive with which it is performed is immaterial; and, if it be said that all the later purposes are the instruments by which the first purpose may be effected, this, as it seems to me, may be an argument for showing that the first purpose is lawful, but it cannot establish that the later purposes are not.

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Even if all the objects of the company were illegal, it would not follow that while the certificate of incorporation remained unrevoked the company would be unable to receive money. It is a mistake to treat the company as a trustee, for it has no beneficiaries, and there is no difference between the capacity in which it receives a gift and that in which it obtains payment of a debt. In either case the money can only be used for the purposes of the company, and in neither case is the money held on trust. If, by oversight, or mistake a company were incorporated for wholly illegal objects, the right course to follow, where its capacity to receive money was questioned in legal proceedings, would be to direct an adjournment till proper steps had been taken to revoke the incorporation. This matter has been so fully dealt with by Lord Parker, with whose views I entirely agree, that I do not desire to elaborate it further. For these reasons I am of opinion that this appeal should be dismissed.

The question of costs was considered on May 17.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 17, 1917.

Solicitors for appellants : *Calder Woods & Pethick.*

Solicitors for respondents : *Stoneham & Sons.*

[IN THE HOUSE OF LORDS.]

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DENNIS (BY HIS NEXT FRIEND) (PAUPER) . . . APPELLANT ;

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A. J. WHITE AND COMPANY RESPONDENTS.

Workman's Compensation—Accident arising out of Employment—Street Risk—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.

Where a workman is sent into the streets on his employer's business, whether habitually or occasionally, and whether on foot or on a bicycle, or on an omnibus or a car, and he meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of as well as in the course of his employment ; and it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under the like conditions.

The view of the First Division of the Court of Session in Scotland upon this point, as expressed in *M'Neice v. Singer Sewing Machine Co.* 1911 S. C. 12, *Hughes v. Bett*, 1915 S. C. 150, and *White v. Avery*, 1916 S. C. 209, preferred to the view of the Court of Appeal in England, as expressed in *Pierce v. Provident Clothing and Supply Co.* [1911] 1 K. B. 997, *Sheldon v. Needham* (1914) 7 B. W. C. C. 471, and *Slade v. Taylor* (1915) 8 B. W. C. C. 65.

A boy in the employment of a firm of builders was ordered to go through the streets of London on a bicycle to fetch some plaster. He came into collision with a motor car and was injured :—

Held—(1.) that the accident arose out of the employment ; (2.) that, the facts being not in dispute, this was a question not of fact, but of law.

Per Lord Shaw of Dunfermline : It is the duty of the arbitrator to make definite findings of fact.

Decision of the Court of Appeal [1916] 2 K. B. 1 reversed.

APPEAL from an order of the Court of Appeal affirming an award of the judge of the Westminster Court under the Workmen's Compensation Act, 1906. (1)

The appellant, a boy aged sixteen, was employed as a plumber's mate by the respondents, a firm of builders carrying on business

* *Present*: LORD FINLAY L.C., EARL LOREBURN, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD PARMOOR.

H. L. (E.) in Westminster. In the course of his employment it was his duty to go upon errands to different parts of London, and on such occasions he was directed to use a bicycle belonging to the firm.

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On August 27, 1915, he was ordered to go on a bicycle a distance of one mile from the firm's premises to fetch some plaster, and as he was crossing Sloane Square he came into collision with a motor car and was knocked down and his left leg was broken. The appellant had for the purposes of the firm used the bicycle about once a day for a period of eighteen months.

The respondents denied liability to pay compensation on the ground that the accident did not arise out of the employment. They called no evidence and did not dispute the material facts.

The county court judge awarded that the respondents were not liable to pay compensation.

The Court of Appeal by a majority (Lord Cozens-Hardy M.R. and Phillimore L.J.; Sargant J. dissenting) affirmed this award.

1917. April 24. *C. T. Williams* (with him *E. Lewis Davies*), for the appellant, was stopped.

Rigby Swift, K.C., and *Shakespeare*, for the respondents. This was a risk common to all, and the county court judge must be taken to have so found. It arose out of circumstances quite irrespective of the appellant's employment, and there was nothing in the employment which accentuated that risk. This is a question of fact for the county court judge: *Clayton v. Hardwick Colliery Co.* (1); *Trim Joint District School Board v. Kelly*. (2) The use of a bicycle is part of the ordinary user of the streets. The words "out of" place a limit upon the accidents in respect of which compensation can be recovered. An accident does not arise out of the employment unless the workman by reason of his employment is exposed to some special, extra, or additional risk. It must be a risk which is in some way differentiated from the risk which ordinary members of the public run. There must be some causal connection between the accident and the employment: *Kitchenham v. Owners of S.S. Johannesburg* (3), per Fletcher Moulton L.J., expressly

(1) (1915) 9 B. W. C. C. 136, 138.

(3) [1911] 1 K. B. 523, 526,

(2) [1914] A. C. 667, 680, 690, 527; affirmed [1911] A. C. 417.
691, 704, 715.

approved by this House in *Webber v. Wansborough Paper Co.* (1); *Warner v. Couchman* (2); *J. & P. Hutchison v. M'Kinnon*. (3)
 [They also referred to *Thom v. Sinclair*. (4)]

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The House took time for consideration.

June 14. LORD FINLAY L.C. My Lords, this is a claim for compensation under the Workmen's Compensation Act. The appellant, was in the employment of the respondents, who are builders, and on the day of the accident was, by the orders of the respondents, riding a bicycle through the public streets, having been directed to go on the bicycle to get some plaster. He came into collision with a motor car and his leg was broken.

The county court judge found that the respondents were not liable, and his decision was affirmed by the Court of Appeal, Sargant J. dissenting. The county court judge gave no reasons for his decision. The majority of the Court of Appeal decided against the claim on the grounds that the risk which had resulted in the accident was not special to the employment, but was an ordinary street risk shared by the claimant with the ordinary members of the public, and that the question was one of fact. Sargant J. dissented on the grounds that he thought that riding a bicycle in the streets of London on an average once a day involved an appreciable extra danger and that the inferences to be drawn were of mixed law and fact.

In my opinion the decisions below were erroneous and should be reversed.

The only question is whether the accident arose out of the employment. It is not disputed that the appellant was riding the bicycle in the course of his employment and by the orders of his employer. The risk of collision under such circumstances is incidental to the use of a bicycle; it is a risk inherent in the nature of the employment, and it was the cause of the accident. It follows that the accident arose out of the employment. It is quite immaterial that the risk was one which was shared by all members of the public who use bicycles for such a purpose. Such as it was, it was a risk to which the appellant was exposed in carrying out the orders of his employer.

(1) [1915] A. C. 51.

(2) [1912] A. C. 35.

(3) [1916] 1 A. C. 471, 484.

(4) *Ante*, p. 127.

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If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle, or on an omnibus or car, and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment. The frequency or infrequency of the occasions on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment. The use of the streets by the workman merely to get to or from his work of course stands on a different footing altogether, but as soon as it is established that the work itself involves exposure to the perils of the streets the workman can recover for any injury so occasioned. As it was put by Lord Parmoor in his judgment in *Thom v. Sinclair* (1) in this House, "The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment."

There are of course, cases in which it is necessary to inquire whether the nature of the employment specially exposes a workman to a risk of a general nature. In the case of injury by lightning it is very material to inquire whether the work involves special exposure to the danger of being so struck, as in the case of employment upon a steeple or elevated scaffolding. In the case of injury by a bomb thrown from hostile aircraft the fact that the workman was engaged on work in a building brilliantly lighted so as to attract the notice of the enemy crews might be most material as showing that the injury by the bomb was one which arises out of the employment. In the case of sunstroke or frostbite it is material to show that the work involves special exposure to the heat or the cold. If the injury is the result of an assault it is material to show that the employment is such as to involve liability to such mishaps; as in the case of a gamekeeper or watchman: see *Mitchinson v. Day Brothers* (2) and *Weekes v. Stead & Co.* (3) Where the risk is one shared by all men, whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved. But when a workman is sent into the street on his master's business, whether it be occasionally or habitually, his

(1) Ante, pp. 127, 145.

(2) [1913] 1 K. B. 603.

(3) (1914) 7 B. W. C. 398.

employment necessarily involves exposure to the risks of the streets and injury from such a cause arises out of his employment. There is nothing in the Act about any necessity for showing that the employment involves an extra or special risk, and once it is clear, as it is in the present case, that the accident was the result of a risk necessarily incidental to the performance of the servant's work, all inquiry as to the frequency or magnitude of the risk is irrelevant. It is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the streets. The frequency of the exposure to a risk increases the chance of the occurrence of an accident, but it has no bearing on the question whether it arose out of the employment, which is settled by the fact that such exposure was one of its terms whether on many occasions or on one.

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This subject has been a good deal discussed in the Scottish Courts. In the case of *M'Neice v. Singer Sewing Machine Co.* (1) a salesman and collector, while riding a bicycle in the streets in the course of his employment, was kicked on the knee by a passing horse, and claimed compensation from his employers under the Workmen's Compensation Act, 1906. The Lord President (Lord Dunedin), in giving judgment, made the following observations :

“ The accident must, of course, arise both in the course of and out of the man's employment. Well, now, it is admitted that this accident arose in the course of the appellant's employment. He was doing his ordinary business as a canvasser when the accident occurred. The only question to be determined that has been argued before us is whether it arose out of his employment. Now, I think it did. I think that it was one of the ordinary dangers to which his employment exposed him, because it is quite clear from the statements before us that his employment as collector forced him to traverse the streets. And I think, therefore, that a danger, which is an ordinary danger in the street—and I think we are entitled of our own knowledge to know that the behaviour of a passing horse is one of the ordinary dangers of the street—is therefore a danger arising out of his employment.

“ It is quite true that many members of the public are exposed to the same danger, but that does not seem to me to be the criterion.

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These many members of the public might be either parties who are in employment or who are not ; but, even if they were parties in employment, they might well be in the street, not in the course of their employment, and then there would be no liability. I refer to the ordinary case of a workman who is leaving the factory. After he has once got clear of the factory and is going to his own home in another part of the town, he would not then be injured in the course of his employment."

In the case of *Hughes v. Bett* (1) the claimant had occasionally to fetch his employer's letters from the post office in the country town ; and generally rode a bicycle on such errands ; he was injured through a man lurching against him and knocking him over. The Lord President (Lord Strathclyde) expressed himself as follows :

" But it was argued to us that the risk here was not incidental to the respondent's employment, because the employment was not one in which the workman was exceptionally exposed to the danger which caused the accident. It was said that the same accident might have befallen any member of the public who chanced to be riding a bicycle on that road at that time. That is true, but irrelevant. The statute recognises no such distinction. If the distinction were sound, then the vast majority of workmen would be deprived of the benefits of this Act, because they in the course of and arising out of their daily employment encounter the very same risks which are faced every day by members of the public. Members of the public do not recover compensation because either they are not employed or the accident happened when they were not in the course of their employment. The argument that was advanced to us was that a risk was never incidental to the employment if it was a risk which might befall any member of the public. That argument was advanced, as will be seen from an examination of the report, in *M'Neice's Case* (2), and was there negatived, as will be seen by an examination of Lord President Dunedin's opinion in the case. Therefore, *M'Neice's Case* (2) is an authority precisely in point. The fallacy was admirably exposed in the opinion of Lord Justice Buckley in the case of *Pierce* (3), where he says : ' The question whether the accident is the result of a risk to which all mankind are

(1) 1915 S. C. 150, 152, 153, 154.

(2) 1911 S. C. 12.

(3) [1911] 1 K. B. 997, 1003.

more or less exposed is in my judgment not an exhaustive test of the question whether or not the accident arises out of the employment. The words "out of" necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of an employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind.'

"But it was argued to us that there was a distinction between the case we have before us and these two decisions to which I have referred in respect of the frequency with which the workmen in these two cases were compelled, by the nature of their employments, to traverse the streets, and the infrequency of the respondent's visits to Milnathort Post Office. If, it was argued, the respondent had gone oftener to the post office (how much oftener no man can tell) then the risk would have been incidental to his employment and his right to recover clear. But if he went seldom to the post office (how much more seldom no man can tell) then the risk would have been one to which all the world was liable and his right to recover would be barred. That argument is obviously unsound for this reason, that it makes the character and quality of the risk depend upon the number of times which the workman is called upon to face it. The unsoundness, or rather the absurdity of the criterion is, I think, well exemplified in the case before us. For it was conceded that, if the respondent had harnessed his horses and driven to the post office for his employer's letters, then an accident which had chanced to befall him on the road would have been an accident arising out of and in the course of his employment, and yet it is found as one of the facts in this case that it was just as much part of the man's employment to go to and fro on the road, between his mistress's house and the post office, on his bicycle as it would have been to have gone in the carriage, and the carriage accident would have warranted a claim for compensation under the statute even although he had visited the post office only once in a way in the carriage instead of going regularly, when he was bidden to do so, on his bicycle.

"Traces of what I may call the heresy in this case are to be found in the opinions of the Master of the Rolls and of Lord Justice Buckley

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in the case of *Pierce* (1), where the Master of the Rolls said: 'I think that this man was more exposed than other people. His employment exposed him to the risks of the streets practically all day long, allowing only for the intervals of going inside the houses of the people he was visiting.' And in Lord Justice Buckley's opinion, where he says: 'In the case before us the man was a collector and canvasser and for the purposes of his employment it was his duty throughout the day to be continually passing from place to place through the streets. He was thus exceptionally exposed to street accidents.' Now, if in that case the learned Master of the Rolls and Lord Justice Buckley would have denied the man compensation if he had only gone upon the streets on his bicycle on rare occasions and not often, then I respectfully dissent from that view, for I do not think that the right to compensation can depend upon the number of times upon which a man performs his duty. A risk may be incidental to an employment even though the workman has to face it only at wide intervals of time. If the Irish case which was cited to us, *Greene* (2), and the recent case in the English Court of Appeal, *Sheldon* (3), really turned upon the doctrine that a risk is not incidental to a workman's employment when it is a risk which any member of the public may be called upon to face, then I very respectfully dissent, because it appears to me that such a doctrine is antagonistic to the terms of the statute which we are here administering."

Similar views as to the effect of the Act are expressed in the judgments of the majority of the Court of Session in *White v. Avery*. (4) The Lord President deals with the point as follows:

"It is common ground that the accident arose in the course of the appellant's employment. The question for our decision is whether it arose out of his employment. Now, the learned arbitrator came to the conclusion that it did not, because the risk which the appellant ran in walking upon the slippery road was not a risk to which he was exposed by the nature of his occupation, but was simply an ordinary risk to which every pedestrian was exposed.

(1) [1911] 1 K. B. 997, 1001, B. W. C. C. 573.
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(3) 30 Times L. R. 590; 7

(2) [1912] 2 I. R. 430; 5 B. W. C. C. 471.

(4) 1916 S. C. 209, 220, 221.

In my view that is an unsound statement of the law, for the risk on that road at that particular time appears to me to have been a risk incidental to the man's employment. And it was none the less a risk incidental to the man's employment because every pedestrian on that road at that time would have required to face it, or because the appellant was facing it for the first, and, it may be, the only time."

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The views so expressed in the Scottish Courts appear to me to be in accordance with the plain meaning of the Act. In the English Courts, on the other hand, the view has been taken that in order to make an employer liable in such a case the employment in the streets must be continuous. In *Pierce v. Provident Clothing and Supply Co.* (1) the claimant was a canvasser who used a bicycle in calling upon customers, and one of the reasons given for holding that the accident arose out of the employment was that his employment exposed him to the risks of the streets practically all day long. The Master of the Rolls says: "This work of course necessarily involved spending a great part of the day in the streets in this triangular area; and in the course of his duties he was beyond all doubt much more exposed to the risks of the streets than ordinary members of the public."

In *Sheldon v. Needham* (2) the claimant was a charwoman in regular employment who had been sent by her employer to post a letter at the post-box about 100 yards from the house. She slipped on a banana skin in the street and broke her leg. It was held that the accident did not arise out of the employment on the ground that it was due to a risk no greater than is run by all members of the public. The Master of the Rolls in the course of his judgment referred to his dictum in *McDonald v. Owners of S.S. Bananu* (3), where he said: "To give an illustration, which possibly appeals to most of us, if I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to or from my friend's house, I should be liable"; and stated that this was an illustration and not intended to lay down any principle such as was contended for on behalf of the claimant, and with the concurrence of the other members of the Court, Swinfen Eady L.J.

(1) [1911] 1 K. B. 997, 999.

(2) 7 B. W. C. C. 471.

(3) [1908] 2 K. B. 926, 929.

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and Pickford L.J., laid it down that the claimant could not recover on the ground that there was no continuous exposure to the risks of the streets, and that the danger was no greater than that run by all members of the public. The law was laid down to the same effect by the Master of the Rolls and Swinfen Eady L.J. in *Slade v. Taylor* (1)—a case in which it was held that the claimant who used a bicycle once a week on his master's business was not entitled to recover, but Phillimore L.J. concurred only because, in his opinion, the matter was concluded by authority.

In the case now before your Lordships' House the Court of Appeal consisted of Lord Cozens-Hardy M.R., Phillimore L.J., and Sargant J. The Master of the Rolls and Phillimore L.J. disallowed the appeal on the ground of the decision in *Slade v. Taylor* (1), and also on the ground that the county court judge's decision on a question of fact was final. Sargant J. differed, and held that the appeal should be allowed on the ground that riding a bicycle in the streets of London once a day on an average involved appreciable extra danger as incidental to the employment, while as regards the second ground given by the majority of the Court for their decision he said (2): "On the second point, as to whether it is a question of fact for the learned county court judge, or a question of law, or a question of mixed fact and law, I feel the greatest difficulty. No doubt there is the view of Lord Loreburn which has been mentioned by the Master of the Rolls; but there is also the view of Lord Dunedin in the recent case of *Trim Joint District School Board v. Kelly* (3) that, where all the facts are undisputed, the inferences to be drawn are probably inferences of law, or, at any rate, inferences of mixed law and fact; and of the two views the latter is the one which would commend itself to me. However, having regard to the view taken by the other members of the Court, my opinion becomes of no importance."

In my opinion both grounds for the decision of the Court of Appeal fail. For the reasons I have already given I am of opinion that the accident arose out of the employment, being due to a risk of the streets which the employment required the claimant to face. As regards the second ground, I think that the decision of the

(1) 8 B. W. C. C. 65.

(2) [1916] 2 K. B. 1, 7.

(3) [1914] A. C. 667.

county court judge was in no sense a decision on a question of fact. No fact was in dispute, and the case did not depend on any inference of fact to be drawn from the facts admitted. The only question in the case was whether on the admitted facts the accident arose out of the employment. This is not a question of fact, but of law. The judgment of the majority of the Court of Appeal appears to me to be erroneous, and I agree with the conclusion reached by Sargant J., although for somewhat different reasons. In my opinion the decision of the Courts below should be reversed, and judgment entered for the appellant with costs here and below, and a direction that the amount of compensation if not agreed should be assessed in the county court.

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EARL LOREBURN. (1) My Lords, with the greatest respect, I cannot agree with the order appealed from. When a man runs a risk incidental to his employment and is thereby injured, then the injury arises out of his employment. This is what happened here. I can see no other possible conclusion from this evidence.

There may be and have been cases in which the risk which resulted in the injury would not at first sight appear to be incidental to the employment but apparently had no relation to the employment and was common to all who might be at or near the spot at the time. Even then it may be possible to show that the employment exposed a man in a special way to that common danger and so to establish that it was incidental to the employment. Such was the lightning case and the Zeppelin bomb case.

Some of the learned judges seem to be of opinion that a risk is incidental to an employment only if it be one that is peculiar to the employment or one which other people do not share. I cannot assent to that view. It would enormously restrict the language of the Act. Many risks may be incidental to an employment which are common to almost every one, such, for example, as the dangers of the street, which last is this very case. It is one thing to say that if an employment peculiarly exposes a man to a risk that risk is incidental to the employment. It is quite a different thing to say that if other people are also exposed to the risk then the risk is not incidental to the employment.

(1) Read by Lord Shaw of Dunfermline.

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I should not have thought it possible that the process of perverting an Act of Parliament by divorcing judicial expressions from their context and from the subjecta materies could have been carried so far as it has been in some of the arguments I have heard on this statute.

I believe that a conclusion from evidence is a conclusion of fact. But, of course, the award may be wrong in law, as, for example, because the Act has been wrongly interpreted or because there is no evidence to support the conclusion of fact. It is an old rule that when there is no evidence reasonably to support a conclusion of fact or a verdict the Court has jurisdiction as on a matter of law. If there is conflicting evidence, the award under this Act is final on the conclusion of fact.

LORD SHAW OF DUNFERMLINE. My Lords, in the present case there has been an award that the respondents are not liable to pay compensation under the Act of Parliament. But there are no statements nor findings of fact. (1) We are not told by any finding whether the learned arbitrator held that there was any accident, or any injury, or whether what occurred, if anything, arose in the course of the workman's employment, or whether it arose out of it. Neither an affirmative nor a negative on any of these propositions is found. My doubt in such a situation is whether the duty of a Court of Law should not be to send the case back to the arbitrator, so that the Court may be in possession of precise findings in fact before proceeding to determine the question of law, if any, which they raise.

I venture to think that it is the duty of the learned arbitrator to make such precise and definite findings; and I understand that your Lordships are all of the opinion that this is the correct as well as, plainly, the advantageous course.

The parties, however, came before the Court of Appeal and before this House asking acceptance of these propositions of fact, namely, that this workman was sent by his employers' orders out into the traffic of the streets of London, on his masters' business, and instructed to use a bicycle in the necessary perambulations. Acci-

(1) We are assured by the learned county court judge that he did find specific facts and give reasons.—F. P.

dent and injury were admitted, and it was also admitted that these occurred in the course of the workman's employment just described. The arbitrator and the Court of Appeal, however, held that the accident did not arise "out of" the employment.

Is this correct in law? Upon that question, my Lords, I do not propose to add anything to the judgment which I delivered in this House a short time ago in the case of *Thom*. (1) The whole mass of authority was there considered by this House, including, I think, every one of the cases mentioned in the Court below, and said to have influenced the arbitrator's mind. Unfortunately *Thom* (1) was only decided in 1917—later by a year than the pronouncements in the present case. I feel sure that, had the principle of *Thom's Case* (1) been before the Courts below the result would have been a finding of liability.

For, my Lords, this case is even much clearer than *Thom's*. (1) In that case I ventured to say that the statutory expression "arising out of the employment" applied "to the employment as such—to its nature, its conditions, its obligations, and its incidents." The present case is thus clearly covered. It is so plain as this—that the workman while obeying an express order, and that in the express manner which had been prescribed for doing so, met with his accident. That is to say, while performing the obligations of his employment under the conditions of his employment he incurred the danger which his employment made him confront. I think that it would be to stultify the statute, or at least very largely to sterilize its benefits, if such an accident were held not to arise out of the employment.

I respectfully agree with the judgment of the noble and learned Lord on the woolsack.

LORD PARKER OF WADDINGTON. (2) My Lords, in my humble judgment this is a plain case. It requires no direct evidence to prove that a boy employed to ride a bicycle through London traffic runs the risk of injury by collision with other vehicles. The risk is inherent in the nature of the employment, or, to put it in another way, if a collision occurs, a causal relationship between the employment and the collision can be properly inferred, and in default of

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(1) Ante, p. 127.

(2) Read by Lord Shaw of Dunfermline.

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A person employed to break stones runs the risk of being injured by a flying splinter. A person employed to climb a ladder runs the risk of injury from a fall. In neither case would positive evidence be necessary to prove that the injury by accident arose out of the employment. That it did so arise would be a legitimate inference from the nature of the employment coupled with the occurrence of the accident causing the injury. There may, of course, be risks so general that without further evidence no such inference would arise. Every one is liable to be struck by lightning, to be frost-bitten, or to be injured by bombs dropped from hostile aircraft. In such cases it may be necessary to establish the causal relationship implied in the expression "injury by accident arising out of the employment" by positive evidence, such, for example, as proving that the circumstances of the employment exposed the employee to a greater risk than that run by persons not so employed, or not so employed under the same conditions. But these can have, in my opinion, no application to the accident with which this appeal is concerned. The learned arbitrator gave no reason for his decision, but he appears to have been influenced by the fact that in riding a bicycle through the London traffic the boy ran no greater risk of collision than any one else riding a bicycle through the same traffic. This, though true, is nihil ad rem. A person employed to break stones or climb a ladder runs no greater risk than any other person who breaks stones or climbs a ladder, but this is no reason for holding that when he is injured by a flying splinter or a fall the injury by accident does not arise out of his employment. If it were, the Act would in very many cases be a dead letter. In those cases where it is necessary to consider whether a particular employment by its circumstances involves special liability to a risk which is in its nature general the contrast is between persons engaged in the particular employment or under the particular circumstances and persons not so employed or not so employed under the same circumstances. It is not between the injured workman and others doing the same thing under the same circumstances or the same conditions. When once it is manifest that what the workman is employed to do involves a particular risk, it almost necessarily follows that

all who do what the workman is employed to do run the same risk ; but this cannot, in my opinion, deprive the workman of his right to compensation under the Act.

In my opinion, therefore, the appeal ought to be allowed. I see no difficulty in overruling the decision of the arbitrator, first, because he did not draw from the facts proved before him the inference which, in my opinion, he ought to have drawn, and, secondly, because he was, I think, under a misconception of law.

My Lords, inasmuch as expressions used by judges in deciding cases under the Act have so often been used in a way their authors never intended, I desire to add a word of caution. I am dealing only with cases where the particular risk is involved in the particular thing which the workman is employed to do. I am not dealing with cases where the particular thing in which the risk is involved is not the particular thing which the workman is employed to do, but is one which, so far as his duties are concerned, he may or may not do at his own choice, though it be, in fact, done in furtherance of those duties. If, for example, a person employed as a lamplighter chose, in order to save time, to ride a bicycle between the various lamp-posts on his round, and in so doing met with injury by collision, I doubt whether it could be inferred without more that the injury by accident arose out of his employment. The case for such an inference would, no doubt, be strengthened by proof that this was the well-known practice of persons employed as lamplighters, and must therefore have been contemplated by both employer and employed as a probable, or at least possible, mode of the employed fulfilling his duties, just as it is both possible and probable that factory hands will walk or go by 'bus, tram, or bicycle to the scene of their labours, though no one would at present contemplate their arrival by aeroplane. With such cases your Lordships are not now concerned, and I desire to make it clear that nothing I have said has any reference to them. What I have said relates only to a risk involved in doing the particular thing which a workman is employed to do.

LORD PARMOOR. My Lords, the appellant was a plumber's mate in the employ of the respondents, who had works in Westminster. In the course of his employment he was directed to go on a bicycle

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for a distance of a mile from the premises of the respondents in order to get some plaster. While riding his bicycle in Sloane Square the appellant's left leg was broken in a collision with a motor car. The only question for debate in the appeal is whether the accident from which the injury resulted arose out of the employment of the appellant by the respondents. The county court judge found that the respondents were not liable. This decision is not open to review unless there has been error in law. The Court of Appeal have by a majority upheld the award.

There is no dispute as to the material facts, and no evidence was called on behalf of the respondents at the hearing in the county court. It is not questioned that the accident arose in the performance of a duty which his employment imposed upon the appellant, namely, in the riding of a bicycle through the streets of London. If the learned county court judge has based his decision on an inference of fact drawn adversely to the appellant, there is no evidence which in reason could justify such a finding, and there is error in law on which his decision is open to review. In my opinion the decision of the county court judge is not based on any inference of fact drawn adversely to the appellant, but on a construction of the Act similar to that which has been adopted by the majority of the Court of Appeal, but which, with all respect to that Court, appears to me to be untenable.

If an accident has arisen because of something which it was the duty of the appellant to do in the course of his employment, it is not an answer to say that the same accident might have happened to any other member of the public who was doing the same thing under the same conditions. I am unable to agree with the Master of the Rolls that the accident did not arise out of the employment because it was something which might happen to any member of the public who was riding a bicycle in that way. This test appears to me not to be material. If rigorously applied, it would tend to defeat the purpose of the Act, since in numerous cases a member of the public doing the same thing under the same conditions as an injured workman might suffer injury in the same manner. There is no trace of any such test in the language of the Act.

I agree in the conclusion of Sargant J., and do not think it

necessary to repeat an opinion lately expressed in the case of *Thom v. Sinclair*. (1) In my opinion the appeal should be allowed.

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*Order of the Court of Appeal reversed and judgment entered for the appellant; the amount of compensation, if not agreed, to be assessed in the county court. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House, such last-mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.*

*Lords' Journals, June 14, 1917.*

Solicitors for appellant: *Berry Tompkins & Co.*

Solicitors for respondents: *William Hurd & Son.*

[IN THE HOUSE OF LORDS.]

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TENNANTS (LANCASHIRE), LIMITED . . APPELLANTS;

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AND

June 21.

C. S. WILSON AND COMPANY, LIMITED . . RESPONDENTS.

*Sale of Goods—Contract—Suspensory Clause—"Contingency beyond control of seller or buyer"—War—"Preventing or hindering delivery"—Shortage of Supply—Rise in Price.*

The defendants, who had contracted to sell to the plaintiffs their requirements of magnesium chloride over the year 1914 at the price of 63s. per ton, to be delivered in monthly instalments, failed to deliver 240 tons.

In an action for damages for breach of contract the defendants pleaded that they were entitled to suspend delivery under a condition in the contract which provided that "deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as . . . war . . .) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

\* *Present*: LORD FINLAY, EARL LOREBURN, VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD WRENBURY.



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The greater part of the supply of magnesium chloride available for the British market came from Germany. The outbreak of war on August 4, 1914, put an end to this source of supply, and caused a substantial shortage in the supply, with a consequent rise in price. The defendants, having at this date a large number of running contracts for the supply of magnesium chloride, immediately gave notice suspending delivery to the several purchasers, all of whom except the plaintiffs acquiesced in the suspension. Between August and the end of the year the defendants were able at an increased price to obtain enough magnesium chloride to satisfy the plaintiffs' contract, if they disregarded their other contracts and the normal requirements of their business, but not enough to satisfy all their contracts :—

*Held* (by Earl Loreburn, Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Wrenbury ; Lord Finlay L.C. dissenting), that, apart from the question of price, the evidence showed a shortage in the supply of the article which hindered delivery by preventing the sellers from fulfilling their obligations to their customers in the ordinary course of their business, and that the suspension was justified.

*Per Curiam* : A rise in price would not in itself constitute a hindrance to delivery within the meaning of the condition.

Order of the Court of Appeal [1917] 1 K. B. 208 reversed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Low J.

On April 17, 1915, the respondents commenced an action against the appellants for damages for breach of a contract dated December 12, 1913, for the sale by the appellants to the respondents at the price of 63s. per ton of their requirements of magnesium chloride over 1914, estimated at from 400 to 600 tons, the quantity to be at the buyers' option, to be delivered in equal monthly instalments.

The conditions annexed to the contract provided as follows :—

“ I. Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lock-outs, or the like) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article.

“ II. Any deliveries so suspended shall be taken by the buyer at the same rate of delivery as above specified, commencing after the period assigned to this contract.”

The conditions also contained a provision for arbitration.

(1) [1917] 1 K. B. 208.

The amount of magnesium chloride which the appellants failed to deliver was admittedly 240 tons. H. L. (E.)

The appellants by their defence claimed that under condition I. they were entitled to suspend deliveries of the 240 tons during 1914 and were not bound to deliver the same at any time prior to the issue of the writ in the action by reason of the shortage in the supply of the article consequent on the outbreak of war with Germany on August 4, 1914.

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In the year 1913 the supplies of magnesium available for the British market were as follows :—

(1.) 4300 tons manufactured by the United Alkali Company under a contract dated October 28, 1911, made between the United Alkali Company, the appellants, and Schneider & Co., of Glasgow. The broad effect of the contract was that the United Alkali Company bound themselves to the Stassfurt Chloride of Magnesium Convention, a German trade combination, not to manufacture more than 5000 tons for the year 1913, and agreed to sell the whole of their output for that year, except 700 tons which they required for export, to the appellants at 48s. per ton. The appellants were to have the option of extending the contract over 1914 and 1915, and they exercised this option for the year 1914.

(2.) An unlimited quantity purchasable from Germany. The amount required and used by the appellants in their trade in 1913 in addition to the 4300 tons brought up the total quantity to about 12,000 tons, or 1000 tons per month.

(3.) A small quantity produced by other small manufacturers. For the year 1914 up to the outbreak of the war the appellants had received under their contract with the United Alkali Company 2132 tons (leaving 2168 tons still to be delivered before the end of the year) and 3907 tons from Germany.

On August 4, on the outbreak of the war, the appellants had seventeen running contracts (including the contract with the respondents) for the supply of magnesium chloride, and the unfulfilled balance on these contracts amounted approximately to 2200 tons, or 440 tons per month. The balance due to the respondents on their contract was 250 tons.

On the outbreak of the war the German source of supply was completely cut off, and on August 12 the United Alkali Company

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wrote to the appellants that they were advised that the contract of October 28, 1911, was ipso facto annulled as a result of the prohibition to trade with alien enemies, the appellants and Messrs. Schneider & Co. being in this matter agents of an alien enemy. They, however, expressed their willingness to continue to supply the appellants with magnesium chloride at an increased price. On August 15 the appellants wrote to the respondents informing them of the action of the United Alkali Company and stating that they had no option but to cancel the contract of December 12, 1913; but in a subsequent letter dated October 19, 1914, they admitted that there was no cancellation but only a suspension of deliveries under the contract. They also claimed to suspend all their other subsisting contracts for the sale of magnesium chloride, and, the several purchasers acquiescing in this course, no further deliveries were made under those contracts.

On September 1 the appellants delivered to the respondents a further ten tons, for which they demanded an increased price, thus leaving 240 tons still to be delivered.

The respondents referred the matter to arbitration, and an award was made, but it was treated by the Courts below as void for vagueness and uncertainty, and it is unnecessary to refer to it. The award is set out in the report of the case in the Court of Appeal.

Between August 15, 1914, and the end of the year the appellants obtained 451 tons of magnesium chloride from the United Alkali Company and 138 tons from other sources, 589 tons in all, or approximately 120 tons per month. Of this amount the appellants sold 287 tons to persons with whom they had no contracts of sale and the balance to customers whose contracts had been suspended, at largely increased prices.

On December 7, 1914, the appellants entered into a contract with the United Alkali Company by which the appellants became the sole agents for the United Alkali Company in Great Britain and Ireland for the year 1915 and engaged to take 7000 tons of magnesium chloride in that year in equal monthly quantities at the price of 4*l.* 17*s.* 6*d.* per ton subject to advance. It was further provided that the appellants should only be at liberty to manufacture magnesium chloride themselves if the trade required a greater quantity than 7000 tons in 1915, and then only to the limit of 1500 tons, and

that upon that quantity the United Alkali Company should have the first call. The appellants were allowed to begin manufacture under this contract in January, 1915.

On January 27, 1915, the appellants offered to supply chloride of magnesium to the respondents over the year 1915 at the price of 5*l.* 10*s.* per ton, but they declined to deliver the balance due under the contract of December 12, 1913, at the contract price. Under this contract of December 7, 1914, between the end of 1914 and March 31, 1915, the appellants obtained and sold, as agents of the United Alkali Company, 1156 tons, and they manufactured for themselves 112 tons. Their total supplies during this period averaged 317 tons per month. The total amount of magnesium chloride manufactured by the United Alkali Company from August 4, 1914, to December 7, 1914, was approximately 1500 tons, and to March 31, 1915 (the last date before the issue of the writ to which the returns were made up), 3200 tons.

Low J. came to the conclusion on the evidence that there was a short supply of the manufactured produce, and held that the appellants were justified in suspending delivery under condition I. and that the right to the suspended delivery had not yet arisen. He therefore dismissed the action. The Court of Appeal (Lord Cozens-Hardy M.R. and Pickford L.J.; Neville J. dissenting) reversed the decision of the learned judge, on the ground that, on the construction of the condition, the words "preventing or hindering" qualified the whole condition, and that those words referred to a physical or legal prevention and not to an economic unprofitableness arising from a rise in price.

1917. March 2, 5, 6. *Sir John Simon, K.C.* (with him *Greer, K.C.*, and *A. Hyslop Maxwell*), for appellants. The condition contemplates that a shortage of supply hinders delivery and it is sufficient for the appellants to prove that there was a shortage, but it is conceded that the shortage must be substantial. The evidence shows that the shortage in this case consequent on the outbreak of war was most serious. Down to the outbreak of the war there was an available supply of magnesium chloride of 1000 tons per month coming from two sources, of which Germany supplied nearly two-thirds. Between August 4, 1914, and the end of the year the

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supply was 120 tons per month. At the outbreak of the war the appellants had a number of running contracts upon which 2200 tons remained to be delivered during the remaining five months, or 440 tons per month. There was therefore a shortage of 320 tons per month. That was wholly apart from any consideration of price. It is said that all the purchasers but one accepted the appellants' notice of suspension, and that if the appellants were only required to fulfil the respondents' contract they had more than sufficient for that purpose. But in considering the right to suspend the acquiescence of the other purchasers is immaterial, and it cannot be right to allow the appellants to fulfil the respondents' contract at their expense. The appointment of the appellants as the agents of the United Alkali Company is beside the mark, as they were not free to dispose of the article as they chose. The appellants were therefore justified in suspending delivery, and the right to the suspended delivery has not yet arisen.

*Rigby Swift, K.C.*, and *A. R. Kennedy*, for respondents. As to the construction of the condition, the term "manufactured produce" in the context refers to the ingredients of the completed article as distinguished from the article itself, and the shortage in the supply of the completed article is provided for by the latter limb of the clause about preventing or hindering. There must be a short supply which prevents or hinders the delivery of the article, and of this there is no evidence. It is not contended that the appellants could have delivered to their customers all round, but they could have delivered to the respondents before the date of the writ, for they had made arrangements with other purchasers, and they were offering to sell to the respondents at a higher price. Commercial loss is not within the protection of the condition. The fact that the appellants could not deliver to the respondents and carry on their business in a normal way does not bring them within the condition. There must be something which physically prevents or hinders delivery. [They also contended that the question was concluded by the award of the arbitrator.]

*Greer, K.C.*, in reply. Shortage applies to the article itself; but at any rate the appellants are covered by the concluding words. Hindering does not mean preventing; it means putting in the way serious obstacles to the delivery of the goods.

The House took time for consideration.

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June 21. LORD FINLAY L.C. My Lords, this action was brought by the respondents to recover damages from the appellants for failure to deliver 240 tons of magnesium chloride contracted to be sold and delivered to the respondents under a contract dated December 12, 1913.

The appellants pleaded that they were entitled to suspend the deliveries, in virtue of the first of the conditions of sale, as delivery had been prevented or hindered by the war. There was also an allegation that there was a submission with an award in favour of the defendants which concluded the plaintiffs, but nothing need be said of this, as it was not established in point of fact.

By the contract in question the appellants sold to the respondents magnesium chloride according to their requirements over the year 1914, estimated at from 400 to 600 tons, to be delivered by equal monthly quantities over 1914 at the price of 63s. per ton delivered to the respondents' works. The first of the conditions of sale was as follows: "Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lock-outs, or the like), causing a short supply of labour, fuel, raw material, or manufactured produce or otherwise preventing or hindering the manufacture or delivery of the article."

It is upon this condition that the decision of the case depends.

The magnesium chloride required in this country was derived from two sources, namely, from the works of the United Alkali Company, Limited, whose manufacture was carried on in this country, and from the works of German manufacturers in Germany. The second of these sources of supply was the more important, and ceased to be available as soon as war had broken out between this country and Germany on August 4, 1914. The appellants and Messrs. Schneider & Co., of Glasgow, had entered into a contract on October 28, 1911, with the United Alkali Company, Limited, by which the latter sold to the appellants and Messrs. Schneider the whole production by the United Alkali Company of chloride of magnesium, which was not to exceed 5000 tons, deliverable in equal monthly quantities from January to December, 1913. The purchasers had the option of extending the contract over the years

H. L. (E.) 1914 and 1915, and this option was exercised as regards the year  
 1917 1914, but on August 12, 1914, the United Alkali Company cancelled  
 TENNANTS the contract on the ground that the purchasers were agents for a  
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 LIMITED The appellants had at the time of the outbreak of war a number  
 v. of contracts running for the delivery by them of magnesium chloride  
 C. S. WILSON of contracts running for the delivery by them of magnesium chloride  
 AND on terms similar to those of the contract with the respondents.  
 COMPANY, The purchasers under all these contracts other than the respondents  
 LIMITED. (sixteen in number) accepted the appellants' claim to suspend  
 Lord Finlay deliveries under the first condition.  
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On August 15, 1914, the appellants sent to the respondents the following letter :

“ Messrs. C. S. Wilson and Co., Liverpool.

“ 15th August, 1914.

“ Dear Sirs,—Owing to the war, our principals have cancelled their contract with us for magnesium chloride, and we have therefore no option but to advise you that our contract with you of the 12th December, 1913, is also cancelled.

“ The works are continuing and will continue to make magnesium chloride as long as possible, but they are unable to say how long this may be. They have advanced their price for the present by 10s. per ton, and have instructed us to do the same, and not to accept any orders without first submitting these to them.

“ We have an order from you for forty drums which we shall have to submit to our principals, but in any case they will not enter except at 10s. per ton advance.

“ Your immediate attention will oblige

“ Yours truly,

“ Tennants (Lancashire), Limited.”

The United Alkali Company were the principals referred to in this letter.

On September 1, 1914, the appellants invoiced a certain quantity (ten tons) of magnesium chloride at an advance of 10s. over the contract price—that is, 73s. as against 63s. On September 4 the appellants advised the respondents that the works (the United Alkali Company) had again advanced the price of magnesium chloride a further 20s. per ton, and on September 7 the respondents wrote protesting against the increase being thrown upon them.

By letter of September 11 the appellants told the respondents that they could only regulate their price by the advances which the makers imposed from time to time, and added: "We cannot say that any price is fixed until the order is actually executed."

The respondents wrote on September 26 complaining of non-delivery under the contract, and of the proposed increase of price, and again on the 29th they informed the appellants that they claimed that the contract was not cancelled, and that they must hold the appellants responsible for non-delivery. On October 19 the appellants by letter of that date, admitted that there was "no cancellation, but a suspension of deliveries under contract."

In certain arbitration proceedings an award was made dated November 30, 1914, deciding that the ten tons which had been delivered could only be charged for at the contract price (63s.), and that the 73s. at which they had been invoiced must be reduced to that amount.

By agreement dated December 7, 1914, the United Alkali Company appointed the appellants their sole agents for consumption in the United Kingdom for 1915, the appellants engaging to take from the United Alkali Company 7000 tons in that year and having liberty to manufacture to a limited extent if more was required. The prices were to be fixed by the United Alkali Company, and there was an agreement as to the commission.

On January 27, 1915, the appellants wrote to the respondents stating that they were prepared to contract for chloride of magnesium to the end of 1915 at 5*l.* 10*s.* a ton, and the respondents replied on February 3 that before they would be prepared to consider any proposal of a new contract they would like to know what the appellants proposed as regards completing delivery of the balance of the old contract.

The action was begun on April 17, 1915. Low J. decided in favour of the appellants on the ground that there had been a short supply of magnesium chloride owing to the war, which entitled the appellants to suspend deliveries under the first condition. The Court of Appeal by a majority (Lord Cozens-Hardy M.R. and Pickford L.J.; Neville J. dissenting) reversed this decision on the ground that the evidence did not show any prevention or hindrance within the meaning of the condition, but only an increase in price

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The first question that falls to be decided is the true construction of the first condition. This condition enures for the protection either of sellers or buyers, and entitles them to suspend making or taking delivery pending the events specified. It appears to me to be clear that a mere shortage of supply is not enough unless it prevents or hinders the manufacture or delivery of the magnesium chloride in question. The clause is not grammatically accurate, but the words "or otherwise preventing or hindering" clearly imply that to satisfy the clause the short supply already mentioned must be a shortage which has this effect. It is, to my mind, a question of difficulty whether the words "manufactured produce" should be confined to manufactured produce which was wanted for the manufacture of the magnesium chloride, or would include magnesium chloride itself. It is not necessary to decide this point. Even if the words "short supply of . . . manufactured produce" would not include a short supply of magnesium chloride itself the question would remain whether war had otherwise prevented or hindered the manufacture or delivery of the article. In either case, if manufacture or delivery was prevented or hindered by war, deliveries may be suspended. To bring about the right to suspend under condition I. there must be a prevention or hindrance by war or some other of the enumerated causes, either of the manufacture of the goods required for a particular delivery under the contract or of the delivery itself, as would be the case if the transit of goods were prevented by warlike operations. The fact that there is a prevention or hindrance in respect of such goods in general would not satisfy the clause. The prevention or hindrance must affect the delivery the suspension of which is claimed, and the suspension is only whilst such prevention or hindrance continues.

That goods could have been obtained by the appellants to satisfy the deliveries under the contract with the respondents is quite clear; in fact, the correspondence shows throughout that the only dispute between the parties was whether the respondents should pay the increased price demanded for the goods. The appellants would not have made the profits which they would have made but for the war, or might have sustained a loss on the performance of

their contract under the changed conditions occasioned by the war, but it was hardly contended at the Bar of your Lordships' House that this would amount to a prevention or hindrance within the meaning of the clause, and it is obvious that no such contention would have been sustainable.

For the purpose of showing that delivery was prevented or hindered the appellants relied upon the existence of the sixteen other contracts under which they had contracted to deliver magnesium chloride. They argued that after the war they could not get magnesium chloride enough to enable them to perform *all* these contracts and the respondents'. This was admitted as correct in point of fact, and I think rightly admitted, by Mr. Rigby Swift, the leading counsel for the respondents, in his very able argument. Mr. Winsloe, the appellants' managing director, in his evidence puts the case as follows :—

“ 392. Q. In addition to your contract with Hardy you had running contracts with a large number of people for supply in 1914 ?—A. Yes.

“ 393. Q. Taking all these contracts into consideration, was it possible for you, apart from being hampered, to supply the contract quantity ?—A. No.”

And a little further down in the transcript of the evidence, just after Q. 399 (which refers to the quantity delivered at increased prices), Mr. Greer, counsel for the appellants, says : “ If we liked to sacrifice the increased price, we could have delivered that quantity, but we refused to do it under the contract as we claimed to be entitled to suspend it.” The balance which the respondents claimed under their contract was 240 tons, and the appellants sold to other persons more than this quantity at an increased price. There is a passage in the cross-examination of Mr. Winsloe (Q. 591 to Q. 605) which shows clearly that the appellants could have delivered the goods, but refused to do so because they claimed that the contract was suspended and they could sell them at a higher price. The whole passage is important, but I refer particularly to the following :—

“ 594. Q. These 287 tons were in truth sold to people with whom you had no contract, is not that so ?—A. Yes.

“ 595. Mr. Justice Low : I want to understand this. If you

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could sell during this period 287 tons to persons with whom you had no contract, why did you not let these people have their 240 tons ?—

A. Well, my Lord, we considered the contract was suspended, and if they wanted the thing and came to us—they did not ask us for any during that period.”

“ 599. Mr. Justice Low : Do you really tell us that if the plaintiff asked for it he would have got it ?—A. We would have sold it to him, my Lord, not against the contract, but a separate transaction.

“ 600. Q. If you had got the stuff to deliver, why should you go and make more out of it from somebody else ? This is a question of shortage ?—A. We considered the contract was suspended, my Lord.

“ 601. Q. I do not follow that. If you got the stuff you ought to perform your contract ?—A. There was an enormous shortage notwithstanding, my Lord.

“ 602. Q. That seemed all the more reason why you should have let them have this.

“ 603. Mr. Rigby Swift : In truth, you did get more than enough to supply these people with ?—A. If no one else had any.

“ 604. Q. And you were not supplying any one else under contract, were you ?—A. We were.

“ 605. Mr. Justice Low : You sold it to some one else at a higher price ?

“ Mr. Greer : May I say here, my Lord, that we were entitled to.”

This passage shows conclusively that there was in point of fact no prevention or hindrance of either manufacture or delivery of the goods required for the respondents. The terms of Low J.’s judgment show that he decided in favour of the appellants only because he had been by that time erroneously persuaded that the existence of shortage caused by war gave the right to suspend, though it did not in fact prevent or hinder delivery. The answer made by Pickford L.J. to the argument based by the appellants upon the existence of these other contracts seems to me to be conclusive. Any effect which these contracts might have had on the case was got rid of owing to the arrangement for their suspension made between the appellants and the holders of these contracts. It is stated by Mr. Winsloe, the managing director of the appellants’ company, in the following terms :—

"606. Q. Mr. Rigby Swift: I understood from you that out of all the contracts which you have refused to complete, Mr. Harding, the present plaintiff, is the only one who is suing you?—A. That is so. Yes."

"607. Q. Do I understand from you that with the exception of Mr. Harding all acquiesced in your suspending your supplies?—A. Yes."

"608. Q. They agreed to it?—A. Yes."

"609. Q. In all the other contracts they agreed that the supply should be suspended?—A. When we could deliver them they paid the greater price or agreed to suspend until they could get it at the ordinary price."

"610. Mr. Justice Low: You could have supplied Wilsons out of this 287 tons without running any risk with the other people?—A. Yes, my Lord, so far as I know at present."

The effect of this was that for all practical purposes of this case the other contracts had been got rid of as effectually as if they had never existed or had been formally cancelled.

The arrangement with regard to the other sixteen contracts was obviously entered into about the middle of August, and by it the holders of these contracts were precluded from insisting on delivery during the continuance of the state of things then existing produced by the war. It was on August 15 that the appellants wrote to the respondents advising them that their contract was "cancelled," and I infer that it was at or about the same time that the appellants put forward the same claim against the other contractors, who acquiesced in it, while the respondents refused. The question of the right of the appellants to suspend deliveries to the respondents had not to be decided once for all on the facts as they existed in the middle of August, 1914. The right of suspension would have to be determined in each month as the delivery fell due according to the state of things then existing. As the right to delivery under the sixteen other contracts was got rid of in the middle of August, they could not affect the deliveries to the respondents falling due in the subsequent months, nor, indeed, the August delivery, which might have been made in the second half of that month. What Pickford L.J. says as to the effect of the arrangements made with the other contractors cannot be displaced by any contention that

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the rights of the appellants and respondents had to be determined as things stood in the middle of August and that the arrangements with the other contractors were subsequent and could not affect the respondents. Such an argument fails on two grounds: (1.) that though the right to suspend might have been settled once for all in August, as it was in the case of the sixteen other contractors, this could be done only by agreement, and, as the respondents refused to agree, it had to be settled with them as each delivery fell due; and (2.) that the arrangements with the other contractors were not subsequent, but in the middle of August.

In truth, after the arrangements made with the other contractors, the only effective contract was that with the respondents, and the case must be dealt with on this footing.

It was argued for the appellants that, apart from the existence of other forward contracts, they were entitled to carry on business in ordinary course and might have entered into other contracts, which would have had the same effect upon deliveries to the respondents after the war. If in the ordinary course of business the appellants had before the war entered into other contracts, the obligation to deliver under them, coupled with the shortage caused by the war, might have prevented delivery to the respondents within the meaning of condition I. But it seems obvious that the appellants could not for this purpose have relied upon any contracts entered into by them after the shortage caused by the war. To admit such a claim would be to enable the dealers to break an existing forward contract to take advantage of the rise in prices. This is in effect what the appellants contend for.

It is unnecessary to consider what would have been the result if the purchasers under the other sixteen contracts had, like the respondents, insisted on their right to deliveries. Probably it would be held in such a case that the deliveries would fall to be made in the order of priority as they fell due, and that, in the event of delivery being due under several contracts at the same time, the amount which it was possible to obtain to implement the contracts would fall to be divided among them pro rata, and that as regards any balance remaining undelivered there would be a prevention within the meaning of the clause. As, however, the purchasers under the other sixteen contracts waived

any claim to delivery, it is unnecessary to decide anything upon this point.

I am unable to agree with the ground on which Low J. based his decision. He thought it enough that there was in fact a short supply of magnesium chloride owing to the war, and did not think it necessary to find that the deliveries in question were as a matter of fact prevented or hindered by this short supply.

The dissenting judgment of Neville J. in the Court of Appeal proceeds upon the view that there would be prevention or hindrance within the meaning of the condition if there was a rise in price in consequence of the war. I think that Pickford L.J. was right when he pointed out that a rise in price, even if very great, would not amount to a prevention of delivery on the true reading of the condition, that "prevention" in such a clause must refer to physical or legal prevention and not an economical unprofitableness, and that "hindering" must refer to an interference with the manufacture or delivery from the same cause as "preventing," but interference of a less degree.

Pickford L.J. found that there was no prevention or hindering by war, inasmuch as all the appellants' contracts except that with the respondents had been got rid of as regards any claim to delivery, and there was no doubt that magnesium chloride could have been obtained by the appellants in quantities sufficient to satisfy the respondents' contract, though they would have had to pay an enhanced price for it, and for the reasons I have already given I think that his judgment, concurred in by the Master of the Rolls, was right.

EARL LOREBURN. (1) My Lords, in this case sellers of chloride of magnesium failed to deliver according to contract, and the only question in this appeal is whether they can be excused under the first condition of sale. The facts as well as the contract are fully examined in more than one of the opinions that I have had the advantage of reading in print. I will, therefore, merely state what, in my opinion, the sellers (now appellants) had to establish in order to make good their excuse, and then state my view as to the case

(1) Read by Viscount Haldane.

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They had to show that the war caused a short supply of magnesium chloride which hindered delivery. By short supply is meant, I think, that the quantity available to the seller was substantially less than his requirements. By "hindering" delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders delivery. If that had been intended different language would have been used, and I cannot regard shortage of cash or inability to buy at a remunerative price as a contingency beyond the sellers' control. The argument that a man can be excused from performance of his contract when it becomes "commercially" impossible, which is forcibly criticized by Pickford L.J., seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect.

Upon the facts of this case I agree that there was a short supply of this commodity. The German source of supply, on which these sellers had relied, was cut off by the war. Their other chief source of supply was also, in fact, cut off or greatly diminished between August 4 and the end of 1914. After that year larger supplies were available, but the sellers became entitled to them in their capacity of agents for the Alkali Company, and were not free to deliver them to their buyers (the now respondents) except upon conditions as to price prescribed by the Alkali Company. In other words, they were not free agents to dispose of the commodity they so obtained. The evidence in this case was given in a very confused way, but the conclusion of it is that the sellers could not have obtained enough of the chloride of magnesium during the relevant period of time to satisfy the requirements of their business even if they had paid the prices required, but that they could have obtained enough to satisfy their contract with the present respondents if they had disregarded other contracts, and other business necessities in order to satisfy the respondents. To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery.

In my view this hindered delivery. It did not prevent delivery or make it impossible, but it hindered delivery within the meaning

of the contract now under consideration, and therefore I think this appeal should be allowed.

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VISCOUNT HALDANE. My Lords, I think that the meaning of the first of the conditions in the contract was that delivery might be suspended in case of war if the war caused a short supply of labour, fuel, raw material, or manufactured produce, or otherwise, that is in any other way, prevented or hindered the manufacture or delivery, of magnesium chloride. The prevention or hindering of manufacture or delivery was thus to be the general difficulty provided against, and a short delivery of manufactured produce was inserted as a particular illustration of the principle. The cases are not disjunctive but are overlapping, and the words relating to prevention or hindering of manufacture or delivery thus include a genus in which the short supply is included as a species. This is how I construe in its context the expression "or otherwise," and if I am right the genus extends beyond the illustrative cases such as short supply. If this be so it of course implies that a short supply of manufactured produce was a hindrance within the words used. I doubt whether in interpreting this contract the expression "supply of manufactured produce" should be read as confined to intermediate products, or so as to exclude from it magnesium chloride itself, the subject-matter of this contract. For magnesium chloride is itself manufactured produce, and the contract relates to sale and not to manufacture. But whether this be so or not, the genus defined by the concluding words of the condition is such that the appellants have only to show that the war had hindered delivery on their part by causing a short supply either of an intermediate product or of the finished article. Now it is not in dispute that there was a serious shortage caused by the suspension of the usual imports from Germany, and it was proved that the appellants had not enough magnesium chloride to fulfil the contracts they had entered into. It was not proved that they could, even by paying a high price, have secured enough of the substance to meet all their obligations. Under these circumstances it appears to me that the case that occurred came within the words of the condition. And I do not see how the appellants could have lawfully delivered to the respondents without also delivering proportionately to



H. L. (E.) the other firms with whom they had entered into similar contracts.  
 1917 They were either bound to all their customers equally or they  
 TENNANTS were not bound to any of them. If the contention of the  
 (LANCA- respondents is right, it only shows that the appellants were at  
 SHIRE), the date of the alleged breach of obligation under similar obliga-  
 LIMITED tions to other customers which they could not fulfil. If they were  
 C. S. WILSON entitled to give the notice they did for this reason give in August,  
 AND 1914, it was the giving of the notice, and not the consent of the  
 COMPANY, customers other than the respondents, which terminated the  
 LIMITED obligations.  
 Viscount  
 Haldane.

The other point made for the appellants that the case was concluded by the award of November 30, 1914, does not arise in this view, and it is not necessary to decide it. I will only observe that a dispute as to whether within the meaning of the contract a case for suspension had arisen appears to me from the correspondence and the award of November 30, 1914, to have been the subject-matter of the arbitration and to have been decided by the arbitrators, and that I am not satisfied that their award was objectionable either on the score of vagueness or of error apparent on its face, or as going beyond the reference.

For these reasons I have come to the conclusion that the appeal ought to succeed.

LORD DUNEDIN. (1) My Lords, the respondents in December, 1913, entered into a contract with the appellants by which they bought from the appellants such magnesium chloride as they would require during 1914, estimated at from 400 to 600 tons, at a certain price, delivery to be made in about equal monthly quantities. The contract contained conditions of sale, No. 1 of which was as follows : [His Lordship read the condition.]

The appellants, as the respondents well knew, were not themselves manufacturers of magnesium chloride. The practical supply of that article came from two sources—first, a limited supply from the United Alkali Company, who had agreed to give the whole of their year's output, which was not to exceed 5000 tons, under reservation of 700 tons, and, second, an unlimited supply from Germany.

Deliveries were duly made under the contract during the first

(1) Read by Lord Atkinson.

seven months of 1914. On war breaking out on August 4, 1914, the United Alkali Company, who in their contract with the appellants had contracted with the appellants and another firm as joint agents for a German convention of chloride manufacturers, denounced this contract as effected with an alien enemy and refused further supplies, except upon new terms, by which they only supplied to them as agents for themselves and at prices fixed by themselves. The supply from Germany stopped altogether, owing to the action of the British Fleet. On August 15 the appellants intimated to the respondents that the United Alkali Company having cancelled their contract with them they must do the same as regards their contract with the respondents. This attitude was modified by a subsequent letter of October 19, which explained that they did not argue that the contract was cancelled, but only that it was suspended.

The respondents, being in urgent need of magnesium chloride, arranged to take further supplies from the United Alkali Company, through the appellants, at an increased price, but contended that the appellants were still held to the contract, and called on them to go to arbitration on the point. Eventually they raised, in April, 1915, the present action asking for damages in respect of the enhanced price they had had to pay. The amount undelivered under the original contract was admittedly 240 tons. In defence the appellants pled the above-quoted clause.

Two questions have been argued before your Lordships—one as to the construction of the clause, and another as to the application of the facts brought out at the trial.

As to construction, the learned trial judge, Low J., held that the word “manufactured produce” covered the completed article magnesium chloride, and that the word “or” was disjunctive. It was therefore, in his view, sufficient, in order to bring the clause into operation, to show that one of the contingencies, to wit war, had caused a shortage, and he found as a fact that that had occurred. In the Court of Appeal all the learned judges held that the word “or” was not disjunctive, and that consequently it must be shown that what had happened by reason of war was something which prevented or hindered the manufacture or delivery of the article, Neville J. held that what had happened did hinder the delivery of

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H. L. (E.) the article, reading “hinder” in the general sense of in any way  
 1917 affecting to an appreciable extent the ease of the usual way of  
 ~~~~~ supplying the article, thus practically coming to the same result  
 TENNANTS as Low J. The Master of the Rolls and Pickford L.J. held that the
 (LANCA- only hindrance therein was a rise of price, and that a rise of price
 SHIRE), could not be applied properly to the word “hinder.” Forming
 LIMITED the majority, they therefore reversed the judgment of the trial
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My Lords, such difficulty as has arisen in construction is probably due to the fact that the terms of this contract are set out by filling up a printed form—which form is strictly appropriate to a manufacturer’s and not a merchant’s contract—on the side of the seller. At the same time it is legitimate in construction to remember what was the position of the merchant in the trade, and to consider what it is he would be likely to wish to protect himself against. It was not a trade of a common article where the markets are many and wide. Practically the sources of supply were only two—the United Alkali Company for a limited amount, Germany for all else. It was therefore only natural that he should wish to meet the case of his not being able to get the stuff himself through some contingency over which he had no control. Nevertheless, grammatically, I think the argument of Mr. Swift was right, that “manufactured produce” does not mean the completed article, but one of the ingredients to form the completed article, and so far the opinion of Low J. was wrong. But I confess I think the discussion becomes quite academic, and I think Low J. in the succeeding part of his opinion is also of this view, when we come to the further words of the clause, “or otherwise preventing or hindering,” which necessarily to my mind show that the former words as to shortage are illustrative of things which prevent or hinder, as the case may be. So that, though Mr. Swift gains so far as to show that to bring in the clause under the circumstances there must be something due to the war which prevents or hinders, he is presently hoist with his own petard, because, taking manufactured produce as meaning ingredients, then the clause clearly shows that in the view of the contracting parties a shortage of ingredients, which can only directly touch the manufacturer and not the merchant, is yet one of the ways by which the merchant may be prevented or hindered from delivering the article.

Now the only way it can prevent or hinder him is if, owing to the shortage of the ingredients, he fails to get the article from the manufacturer himself. Really, without the words of the first part of the clause at all, this seems agreeable to common sense. To say that a merchant is not prevented or hindered from delivering to a customer when he gets either none or an insufficient supply of the article from the manufacturer, but is only so prevented or hindered when there is an impossibility or difficulty concerning the transport from him to the customer, would seem to me to be the height of absurdity. It is also, I think, quite evident that a supply sufficient only for the merchant's needs for his usual customers hinders him in delivery of the full amount to one customer, and that the words used clearly contemplate this position.

It now only remains to be considered whether in fact there was such a shortage of the article of magnesium chloride as to entitle the appellants to invoke the clause. As to this there is, in my opinion, not a shadow of doubt. The figures as shown from the evidence by Sir John Simon speak for themselves. Under running contracts the appellants had on August 1 still to deliver within the year 2200 tons, or an average of 440 tons a month. As a matter of fact, they succeeded in all in getting from the United Alkali Company 451 tons, not upon their old terms as under contract, but as the United Alkali Company chose to supply, and 138 from other sources, or on an average 120 tons a month. The German supply, of course, entirely failed. The respondents do not directly controvert these figures. They say, however, that if the appellants had supplied them in preference to all others there would have been sufficient for them. It is obvious that if this is a good answer each of the other contracting parties could have made it in turn, damages would have been due to all, and the clause would be no protection whatever. What I have already said on construction is a sufficient answer. Then it is said that the other contractors having acknowledged the efficiency and applicability of the clause (for all except the respondents did so in fact) that left their amounts free to be given to the respondents. But the question must be whether in the circumstances at August the appellants were entitled to suspend; and the conduct of the other parties subsequent to that date cannot affect that question. Besides that, the amounts

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due to them did not become free in the possession of the appellants, for, as already stated, the United Alkali Company stopped all supplies except upon entirely new terms, which made the appellants mere agents and not purchasers.

In this state of the facts it is not to be wondered at that the leading counsel for the respondents felt himself constrained to give the admission, when pressed to do so, that the appellants had not sufficient magnesium chloride to satisfy their current contracts.

It is true that his junior, with a great expenditure of labour and time, sought to nullify that admission. Fixing his attention on the opening months of 1915 up to the date of the writ in the case, April, 1915, he sought to show that the appellants had in those months succeeded in getting sufficient tons to have satisfied all the outstanding arrears under the contracts for 1914. Such an argument is based on a transparent fallacy, even if it could be made out on the figures, as to which I am not satisfied. The fallacy consists in this: that it takes all the tons supplied in the first three and a half months of 1915 to meet the arrears of 1914, and consequently assumes business at a standstill for 1915 requirements. It is difficult to conceive a greater "hindrance" to fully executing an old contract than to have entirely to decline business for the first three months of a new year.

I have dealt with the figures of actual supply. I think it is abundantly proved that actual supply was as near as may be possible supply. Where I think, with deference to the learned judges, the majority of the Court below have gone wrong is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more. They have shown a total failure of what after all was the main source of supply to their business, namely, the German article; for before the war their ordinary yearly requirements were about 11,700 tons, whereof 7400 tons were wont to be supplied by Germany. Their position as at August 1, 1914, I have already dealt with. I am therefore of opinion that the appeal should be allowed and the judgment of Low J. restored.

LORD ATKINSON. My Lords, on December 12, 1913, the respondents (plaintiffs) and the appellants entered into a contract for the supply to the former during the year 1914 of from 400 to 600 tons of a substance called magnesium chloride packed in iron drums, at the price of 63s. per ton, to be delivered at the respondents' works in about equal monthly quantities. The contract is printed, and is in the form in general use in Liverpool for both merchants and manufacturers. The conditions of sale, only the first of which is of importance on this appeal, were indorsed on the back of this print and form part of the contract entered into. This condition has been quoted already.

On August 4, 1914, war broke out between this country and Germany. On the 15th of that month, when 240 tons of this chemical remained to be delivered to the respondents under their contract, the appellants wrote to the respondents a letter, the part of which material on this point is as follows: "Dear Sir,—Owing to the war our principals have cancelled their contract with us for magnesium chloride, and we have therefore no option but to advise you that our contract with you of the 12th of December, 1913, is also cancelled." On September 29, 1914, the respondents wrote to the appellants claiming that the contract of December 12, 1913, was not cancelled, and on October 19, 1914, the appellants wrote to the respondents a letter stating that they admitted there was no cancellation of the contract, but merely a suspension of their obligation to continue to make deliveries under it. The respondents insist, however, that the appellants were not entitled to suspend delivery of the remaining 240 tons of magnesium chloride or any portion of it as claimed, but were, on the contrary, bound to deliver that quantity either before December 31, 1914, or at latest after January 1, 1915, at the rate specified in the contract. On April 17, 1915, they instituted the action out of which this appeal has arisen to recover damages in respect of the appellants' failure to do so.

For the purpose of this appeal it may, I think, be taken that the appellants' letter of August 15, 1914, was amended so as to bring it into conformity with theirs of October following, and that all they now claim is the right, in the circumstances admitted to have existed, or found by the judge at the trial to have existed, on August 15, 1914, to suspend at that date the delivery of this quantity of

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H. L. (E.) magnesium chloride at the times and in the manner specified in the contract. To decide whether the appellants are right in their contention one must determine what, on the true construction of this condition No. 1, are the nature and limits of the rights which it confers upon the appellants, and, second, whether the state of things then admitted or found to exist justified the exercise of this right.

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The list of contingencies actually named in condition No. 1 is obviously not exhaustive. The result contemplated as flowing from or caused by them is, I think, a shortage of supply of labour, fuel, or of the materials, whether raw or to some extent manufactured, necessary for the manufacture of magnesium chloride, the article to be delivered. If this shortage should prevent or hinder the manufacture or delivery of this latter chemical, then the appellants have the right "pending" those contingencies to suspend delivery. But that is not by any means, I think, the limit of their right. If other contingencies beyond the control of either buyer or seller should arise which prevent or hinder delivery of the chemical purchased, the seller has also the right, pending these latter contingencies, to suspend the delivery of this article. This is the meaning of the word "otherwise." By "pending" I think is meant while the contingency or contingencies continue to exist. "Preventing" delivery means, in my view, rendering delivery impossible; and "hindering" delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible. Increase of the price of the article is altogether an ambiguous matter. It may arise from a diminution of supply or, the supply remaining abundant, an increase in the cost of production, or the imposition of a tax, or the increased cost of transport, or such like. If the appellants had been in the habit of obtaining all their supplies from English manufacturers the war would almost certainly have raised the price of this as it has done of other products, though possibly the supply might not have been at all diminished. As it was, however, the outbreak of the war—a contingency beyond the control of either buyer or seller—shut off the appellants' main source of supply. In the year 1913 they, as found by Low J., had obtained from Germany 7476 tons and from the United Alkali Company, who were really their principals, 5000 tons of magnesium chloride. Up to August, 1914, they had obtained from Germany 3907 tons and

from the Alkali Company 2132 tons of it. So that even if this latter company had delivered to them the same quantity as in the previous year they had only to look forward to a supply from that source of 2868 tons during the five months of August, September, October, November, and December in the year 1914. It is quite obvious, however, that they could not, in fact, have obtained this quantity of magnesium chloride from the United Alkali Company, since that company only manufactured in these five months 1886 tons. In fact all the appellants obtained from this company from August 4 till December 31, 1914, was 451 tons, and from other sources 138 tons, making 589 tons in all. On August 4 the appellants had entered into separate contracts, similar, apparently, to that entered into with the respondents, with sixteen other buyers binding them to deliver within the year 1914 English or German manufactured magnesium chloride up to the amount of from 4015 to 4335 tons. Of this quantity only 2030 tons had been delivered, leaving about 2000 tons undelivered. The respondents were amongst these buyers. To them, out of the 400 tons purchased under their agreement sued on, there remained on that date 240 tons undelivered. For all that appears the appellants may have entered into other contracts before August 4, 1914, binding them to make delivery in the year 1915 to other purchasers. I understand that it was admitted that the appellants could not on and after August 4, 1914, trading with Germany having become illegal and impossible, have obtained, at any price, enough of the chemical to have fulfilled the sixteen contracts already mentioned. A contingency had on that day arisen which both parties to this contract must obviously have foreseen would, as in fact it did, hinder, if not entirely prevent, the delivery by the appellants, according to their usual course of business, to their customers of the quantities purchased by the latter.

There was then a shortage of supply, having regard to these contracts and to the normal requirements of the appellants' trade, brought about by the occurrences already mentioned. Condition No. 1 immediately applied, and the right of the appellants to suspend delivery in the case of each and every contract containing a condition similar to condition No. 1 sprung into existence. They, as against all their customers bound by such contracts, put this right in force.

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H. L. (E.) With the exception of the respondents all the customers acquiesced
 1917 in their so doing. The respondents did not acquiesce, and no doubt
 TENNANTS the acquiescence of those other customers left in the appellants'
 (LANCA- hands a stock of magnesium chloride sufficient to enable them to
 SHIRE), implement the respondents' contract. That, however, would
 LIMITED appear to me to be irrelevant. The shortage arising from the
 v. causes mentioned gave to the appellants the right to suspend
 C. S. WILSON AND delivery in the cases of all contracts embodying condition No. 1.
 COMPANY, They were entitled to enforce, and sought to enforce, that right
 LIMITED. against all. Those who acquiesced cannot be in a worse position
 Lord Atkinson. than those who did not acquiesce, because it was the original
 shortage of supply, not the conduct or action of the customers in
 reference to it, which conferred the right to suspend delivery.

The whole argument of the respondents has been directed to show that the appellants could have obtained the 240 tons necessary to fulfil their particular contract, and that the appellants were bound to supply them in preference to all others. The respondents were to get what they contracted for, and, if their contention be sound, the other customers to be left with a cause of action. But the delivery, which might be prevented or hindered, was not the mere delivery to one purchaser amongst many of the quantity purchased by him, but *delivery* under the normal engagements of the appellants' trade to the whole body of the customers to whom they were bound to deliver in the year 1914. It is, upon the figures above set forth, clear, I think, that delivery in the latter sense was, if not absolutely prevented, certainly hindered by the outbreak of war shutting off all German supply. In my view the appellants were entitled at the date of their notice, August 15, 1914, to suspend the delivery to the respondents of the 240 tons remaining undelivered. I, therefore, am of opinion that the decision appealed from was wrong and should be reversed. Upon the question of the award made on November 30, 1914, there is, I think, this difficulty: It is impossible, as the case stands, to say with certainty what question was referred to the arbitrator to decide. It may have been the question whether the appellants were entitled to cancel the contract or only to suspend deliveries under it. And if the latter, to suspend them for what time? The word "suspended," in accordance with clause 1 of the conditions of sale, may mean suspended while the contin-

gency preventing or hindering delivery lasts, or it may mean suspending, as distinguished from cancelling, during the remainder of the year 1914, whether the contingency lasted or not. I incline to the opinion, therefore, that as the award stands it is void from vagueness and uncertainty. I think the appeal should be allowed, with costs here and below.

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LORD SHAW OF DUNFERMLINE. (1) My Lords, the contract between these parties was dated December 12, 1913. Under it the respondents bought from the appellants their "requirements of magnesium chloride over 1914, estimated at from 400 to 600 tons," and the contract time of delivery was to be "in about equal monthly quantities."

War broke out between this country and Germany on August 4, 1914. It is agreed that the amount undelivered under the contract for the remainder of the year subsequent to that event is 240 tons. The action is for damages in respect of the non-delivery of this quantity; the defence is that the deliveries after that event—namely, the outbreak of war on August 4, 1914—were properly suspended in terms of one of the conditions of sale which covered the situation which had arisen.

The condition is that "deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as war), causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

The case presents undoubted difficulties, and the opinion of the noble and learned Lord on the woolsack has made me give it a further consideration. But some at least of these difficulties are removed by articulately construing some of the terms occurring in this condition.

It is of course admitted that the general contingency referred to has occurred, and that accordingly the only question is whether results attributable to the contingency have arisen. It was argued that the war had caused "a short supply of manufactured produce": I humbly think, however, that this term "manufactured produce" may possibly be construed as narrower than the

(1) Read by Viscount Haldane.

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ultimate "article" whose delivery was the subject-matter of the contract, and may mean, like raw material itself, one of the constituent elements of that article. To this extent I am not prepared to differ from the respondents' argument as presented.

But a totally different view arises from the remainder of the clause—namely, the words "or otherwise preventing or hindering the manufacture or delivery of the article," that is to say, of magnesium chloride, which, in my opinion, was "the article" referred to. I think that merchants making such a contract must be taken to have meant that if war hindered the delivery of magnesium chloride the condition of suspension should apply.

I think that the right of suspension arose when the contingency began to operate. And my further view is that the operation of the contingency was not limited to the actual prevention of the supply of the particular consignments contracted for, but extended to a hindrance in the delivery of a commercial article in such a way as to interfere with the conduct in a full business sense of the appellants' trade in magnesium chloride.

The construction of the expressions used in the condition being thus stated, the application of these to the facts is not difficult. I see for myself no reason to differ from the judgment thereon (to my mind a thoroughly satisfactory judgment) of the learned Low J., who tried the case. The main supply—about, say, four-fifths of the total supply—of this particular article was from Germany. To tap that source of supply became, after the outbreak of war, illegal. This being so, Low J. finds "upon the facts that the manufacture of this particular substance has not increased in this country at all so as to approach the total quantity formerly available of home manufactured plus German product."

What remains in the case is the argument that, by rigidly confining their entire or almost their entire business to the particular contract with the respondents, it would have been possible for the appellants to deliver. After full consideration I cannot see my way to limit and restrict on the ground stated the right of the merchant to appeal to the condition. The condition appears to me to be one applicable to a hindrance in the delivery of an article of trade in the ordinary and usual course of trade in such an article. A mere fluctuation of price would not constitute such a hindrance; but

in the present case the actual article itself is prevented or hindered from coming into the British market. It does not seem to me to make the condition unavailable to the merchant that he could have avoided the situation by interrupting his whole course of trade and concentrating his business on one order. With much respect to the majority of the Court of Appeal, I do not feel myself free so to construe a commercial contract.

I agree.

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LORD WRENBURY. (1) My Lords, the question is as to the true construction of the first condition of sale in the contract of December 12, 1913, and its application to facts which are not in dispute.

Under that contract the appellants, who were not manufacturers but merchants, were sellers to the respondents of magnesium chloride, deliverable in about equal monthly quantities over the year 1914. Their sources of supply were two, called in the contract "English make" and "quantities shipped from Germany." The contract price was 63s. a ton delivered at the buyers' works—"the minimum quantity of German to be 50 tons." When war broke out between England and Germany the sellers had delivered 109 tons. A subsequent delivery was made under circumstances which it is unnecessary to detail, and there remained outstanding under the contract 240 tons. For breach of contract to deliver these the respondents brought their action for damages. The appellants say there was no breach—that under the first condition delivery had been suspended.

When war broke out the sellers were under contracts with sixteen other buyers for deliveries to be made during the year 1914. Their aggregate commitments for the year 1914 amounted to 4015 tons as a minimum and 4335 tons as a maximum. Of these, 2030 tons had been delivered before August, leaving 1985 to 2305 tons to be delivered.

The sellers were also carrying on a business in which, according to its normal course, spot sales might be, and to a small amount were in fact, made in the last five months of 1914.

This was the position of the sellers who had in December, 1913, entered into the contract which has to be construed.

(1) Read by Lord Atkinson.

H. L. (E.) Condition 1 provides (reading only the relevant words) that :
 1917 Deliveries may be suspended pending a contingency, such as war,
 TENNANTS “ causing a short supply of labour, fuel, raw material, or manufac-
 (LANCA- tured produce, or otherwise preventing or hindering the manufacture
 SHIRE), or delivery of the article.”
 LIMITED

C. S. WILSON The respondents have contended that “ manufactured produce ”
 AND here does not mean or include magnesium chloride, but is confined
 COMPANY, to manufactured produce which is in its turn to be employed in the
 LIMITED. manufacture of magnesium chloride. If this were so, it would result
 Lord Wrenbury. that the merchant (to whom it matters nothing whether the manu-
 —————
 facturer of magnesium chloride is handicapped in his business by
 reason of such a short supply as the respondents contend is meant)
 is leaving himself unprotected in the one thing which does matter
 to him, namely, that there is a short supply of the manufactured
 article magnesium chloride which he is contracting to sell. I see
 no reason to adopt this construction. Then it was said, but faintly,
 that this is a common form of contract used by manufacturers—
 that if a manufacturer were the contracting party the words “ manu-
 factured produce ” would bear the meaning suggested, and that it
 must mean the same in the mouth of a merchant. This is an
 impossible suggestion on a point of construction. If it were true
 it would be true that if a man in a contract speaks of “ my partner ”
 he means somebody else’s partner, because if that other person had
 been the contracting party that would have been the meaning of the
 words. Further, if a manufacturer and not a merchant had been
 the contracting party, I am at a loss to understand why “ manufac-
 tured produce ” should not mean, or at any rate include, the
 produce which he manufactures. It is, in fact, immaterial whether
 the term “ manufactured produce ” includes the meaning suggested.
 It is sufficient if it does not exclude magnesium chloride, and that,
 I think, is plainly true.

Then the respondents contend that the words “ preventing or
 hindering ” control the words “ short supply,” and that there must
 be shown not merely a short supply but a short supply which
 prevents or hinders. Upon this I may say that the word “ other-
 wise ” in the contract may be read in either one of two ways—
 namely, (1.) the words may mean a contingency, such as war,
 “ causing a short supply or which (although it does not cause a

short supply) prevents or hinders," or (2.) "causing a short supply or (in some other way) preventing or hindering." In the former case the words "preventing or hindering" would not, in the latter they would, relate back to and govern the words "short supply." Of these two I prefer the latter, for this reason: The sequence of the words is "war causing a short supply or otherwise preventing," words which seem to mean war preventing in some way, which may be by way of a short supply or in some other way. At any rate, I will assume that this is their meaning, for this, while it is in favour of the respondents, does not affect the conclusion at which I arrive against them.

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For the purpose of this judgment I read the contract as meaning that the seller may postpone deliveries if war causes a short supply of magnesium chloride which prevents or hinders delivery.

The facts to which this has to be applied are as follows:—On August 15, 1914, the sellers gave the buyers notice that the contract was cancelled. This plainly it was not, and nobody says that it was. On October 19 the sellers explained that they meant, not cancelled, but suspended. The remaining sixteen like contracts were in like manner suspended. The sixteen customers accepted that suspension as operative. The seventeenth (the present respondents) did not. On April 17, 1915, they issued their writ for damages for breach. I do not think it necessary to repeat the figures as to the number of tons which the sellers had in August, 1914, or procured before April 17, 1915. The result of the figures is as follows:—Before the war the sellers under a contract with the United Alkali Company were in a position to obtain deliveries from Germany. The war rendered that contract illegal, and the United Alkali Company refused to make, and in fact did not make, any further deliveries under the contract. On December 7, 1914, the United Alkali Company appointed the appellants their agents, and under that agency the appellants obtained deliveries of magnesium chloride. These deliveries were not their property. They could not dispose of them for their own purposes. They were deliverable only as their principals might direct, and they were in fact delivered at prices largely in excess of the 63s. a ton, which was the respondents' contract price. These last-mentioned deliveries are not relevant to the question to be determined. Setting these out of account,

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the appellants had not in August, 1914, and never obtained before April, 1915, magnesium chloride to an amount sufficient to supply the seventeen customers with the amounts which, but for the suspension clause, were deliverable under their contracts, or with more than a very small percentage of those amounts. If spot sales made after August, 1914, are taken into consideration (and I see no reason why they should not), their ability in the above matter becomes less. This position was due to the war. In my opinion the contingency had happened that the war had caused a short supply of magnesium chloride which hindered the delivery of the article. The respondents say that the appellants had enough for delivery to them if they ignored their commitments to every one else. Suppose they had. It remains that for their commitments the supply was short. The "delivery of the article" in condition 1 does not mean that the supply was insufficient to implement the respondents' contract ignoring all others, but insufficient to a substantial and not an illusory amount to admit of delivery of "the article," i.e., magnesium chloride, to whomsoever was entitled to require delivery. Suppose that two of the seventeen purchasers had come simultaneously and asked delivery, that each was contractually entitled to delivery of 200 tons, and that the seller had 200 tons and no more. To the first the seller replies, "I am short." The purchaser rejoins, "No, you are not. There are the 200 tons. I shall take them." He, say the respondents, is entitled to take them, and he does so. To the second the seller replies again, "I am short." According to the respondents' contention the second purchaser could rejoin, "No, you are not, because you could have given me what you have just given to my neighbour. Pay me damages." My Lords, the question answers itself. A trader is insolvent notwithstanding that he is able to satisfy one creditor if he is not able to satisfy all his creditors. A merchant has a short supply notwithstanding that he is able to satisfy one customer when he is not able to satisfy all.

I may add that I do not go with Neville J. in thinking that the condition protects the seller from rise of price. There may be a rise of price without a shortage of supply. Rise of price is, I think, irrelevant except that it may be evidence, when coupled with other facts, that there is a short supply. The matter has to be determined

upon the answer to the question whether at the date of suspension and subsequently down to the issue of the writ there was a short supply. In my opinion there was.

I have said nothing about the award which was made on November 30, 1914, and that for two reasons. The parties have sought and obtained a decision from the Court notwithstanding that award, and before your Lordships they have desired that the correctness of that decision should be reviewed. This is a first reason for deciding the matter in this House as if there had been no award. The second reason is that there are not materials for determining what was the subject-matter of the arbitration. There is no evidence whatever as to the terms of the submission upon which the award was obtained, and further, as I think, there is great difficulty in saying what the award means. It may be—and I incline to think it is the fact—that the second paragraph of the award means no more than that 240 tons is the correct figure of tons still to be delivered, and that their delivery is subject to liability to be suspended in accordance with condition 1.

In my opinion the appeal succeeds, the judgment of Low J. must be restored, and the respondents must pay the costs in the Court of Appeal and before this House.

Order of the Court of Appeal reversed and judgment of Low J. restored. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, June 21, 1917.

Solicitors for appellants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

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May 8.

JONES AND OTHERS APPELLANTS;
 AND
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 OTHERS }
 AND
 THE ATTORNEY-GENERAL FOR THE
 COMMONWEALTH OF AUSTRALIA AND } INTERVENERS.
 ANOTHER }

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia, High Court—Appeal to Privy Council—Competence—Limits of Constitutional Powers—Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 51 (xxxv.), s. 74.

By the Commonwealth of Australia Constitution Act, 1900, s. 51, “the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.” By s. 74, “No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, however arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, . . . unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.”

A Court constituted by the Commonwealth Parliament for the purposes defined by s. 51 (xxxv.) made, upon an application by a federation of builders’ labourers’ associations in different States, an award against the appellants as to wages and conditions of labour. The High Court discharged a rule nisi prohibiting further proceedings upon the award, holding that there was an industrial dispute extending beyond the limits of any one State, and refused to grant a certificate under s. 74 above mentioned:—

Held, that the decision of the High Court was one to which s. 74 applied, and that in the absence of a certificate an appeal to His Majesty in Council was not competent.

APPEAL by conditional special leave from a judgment of the High Court of Australia (May 15, 1914).

* *Present*: EARL LOREBURN, VISCOUNT HALDANE, LORD ATKINSON LORD SUMNER, and LORD FARMOR.

The appellants were master builders carrying on business in New South Wales. The respondents were the Commonwealth Court of Conciliation and Arbitration, the President of that Court, and the Australian Builders' Labourers' Federation. The respondent Court was constituted by the Commonwealth Parliament under the power conferred by s. 51 (xxxv.) of the Commonwealth of Australia Act, 1900 (63 & 64 Vict. c. 12), which is set out in the head-note. Under the Conciliation and Arbitration Act, 1904—1911, by which the Court was so constituted, it had power to hear, and to determine by an award, certain industrial disputes extending beyond the limits of any one State. The respondent Federation was formed in 1910 by a combination of associations of builders' labourers in New South Wales, Victoria, Queensland, South Australia, and Tasmania, and was registered as an organization under the last-mentioned Act.

In July, 1912, the respondent Federation filed in the respondent Court under s. 19 of the Act a plaint, being a series of demands as to wages, hours, and conditions of labour affecting the members of the Federation. The plaint was served on a large number of master builders in the above-named States, including the present appellants. After an inquiry extending from April to December, 1913, the respondent President on December 19, 1913, made and published an award. During the hearing of the plaint objection was taken to the jurisdiction of the Court upon the ground that no industrial dispute within the jurisdiction of the Court existed.

On January 22, 1914, an order nisi was obtained from the High Court of Australia by the appellants calling upon the respondents to show cause why a writ of prohibition should not be issued to prohibit further proceedings in the plaint and upon the award, upon the grounds (*inter alia*) (1.) that there was no industrial dispute between the appellants, or any of them, and the respondent Federation; (2.) that there was no industrial dispute between them extending beyond the limits of any one State; (3.) that two of the provisions of the award, not material to the present report, were bad because the Court had no jurisdiction to make them.

On May 15, 1914, the High Court of Australia (Griffith C.J., and Barton, Isaacs, Gavan Duffy, Powers, and Rich JJ.) made the order

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absolute with regard to the two provisions last mentioned, but otherwise (Griffith C.J. and Barton J. dissenting) discharged the order. The judgments are reported at 18 C. L. R. 224.

The appellants subsequently applied to the High Court for a certificate under s. 74 of the Constitution Act, without admitting that the decision was one to which that section related, but the Court refused the application. The terms of that section, so far as they are material, appear from the head-note.

The Judicial Committee granted special leave to appeal, liberty being reserved to the respondents to contend at the hearing that the appeal was not competent. The Attorneys-General for the Commonwealth and for New South Wales intervened by leave.

1917. May 1, 3, 4. (1) *P. O. Lawrence, K.C.*, and *Harman*, for the appellants; *Romer, K.C.*, and *Austen-Cartmell*, for the Attorney-General for New South Wales, intervener. The decision appealed from is not one to which s. 74 of the Constitution Act applies. The power conferred upon the Commonwealth Parliament by s. 51 (xxxv.) is confined to constituting a tribunal to deal with industrial disputes extending beyond the limits of any one State; that power was never vested in any State. In *Whybrow's Case* (2) the High Court held that the Conciliation Court had no jurisdiction to make an award inconsistent with the law of any State, including as law any award of a wages board acting under powers granted by a State statute. (3) That decision is binding upon the High Court. It follows that the present decision is not one which affects the powers of any State, nor one as to the limits inter se of the powers of the Commonwealth and the States.

Sir John Simon, K.C., and *Harney*, for the Attorney-General of the Commonwealth, intervener; *Rundle*, for the respondent

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| (1) The preliminary objection was formally taken at the commencement of the hearing, but their Lordships desired that the appellants' counsel should open the appeal in order that the Board might be fully informed as to the facts. The argument upon the preliminary objection alone is reported. | (2) (1910) 10 C. L. R. 266. |
| | (3) Examples of the State statutes referred to are: New South Wales, No. 3 of 1908 and No. 17 of 1912; Victoria, No. 2386 of 1912; Queensland, No. 8 of 1908; South Australia, No. 945 of 1907 and No. 1020 of 1910; Tasmania, No. 62 of 1910. |

Federation. Both the Commonwealth and the States have limited and defined constitutional powers as to industrial disputes. The decision is as to the meaning of s. 51 (xxxv.) of the Constitution Act and the extent of the powers thereby conferred upon the Commonwealth. It is, therefore, in effect a decision as to the limits inter se of the powers of the Commonwealth and of the States. That proposition is necessarily involved in the decision of the Board in *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.* (1) Sect. 51 does not confer exclusive powers, in the sense that what is thereby conferred is taken away from the States.

[VISCOUNT HALDANE. It was not intended by the use of the word "transferred" at pp. 254 and 255 of the judgment in that appeal to suggest the contrary; the word "exclusively" in the head-note at p. 238, line 3, should have been omitted.]

The decision in *Whybrow's Case* (2) really supports the validity of the preliminary objection; it shows that the demarcation of the respective powers is involved.

P. O. Lawrence, K.C., replied.

May 8. The judgment of their Lordships was delivered by

EARL LOREBURN. The respondents in this case raised a preliminary objection to the effect that s. 74 of the Commonwealth of Australia Constitution Act precluded the Board from entertaining this appeal at all. That section forbids appeals to the Queen in Council "from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States . . . unless the High Court shall certify that the question is one which ought to be determined by the Queen in Council." No such certificate has been given in the present case.

Accordingly, it becomes necessary to inquire what the decision of the High Court actually was. The High Court refused to prohibit the Commonwealth Court of Conciliation and Arbitration from proceeding upon an award of their president as to the hours of work, wages, payment for overtime and for work done on holidays, compensation for accidents, and other matters concerning the terms and conditions of the employment of builders' labourers throughout

(1) [1914] A. C. 237.

(2) 10 C. L. R. 278.

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Australia. The contention before the High Court was that the President had no power to make that award, and the High Court decided that he had power, because he had been authorized to make such awards by an Act of the Commonwealth Parliament pursuant to the Commonwealth Act.

Now, that Parliament can make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." But the rights of the State under its own Constitution must be borne in mind. Their Lordships do not express any opinion as to the power of the State to settle industrial disputes within their own borders, even though they have extended into other States, because that is the province of the High Court to determine, and the point has not been argued, but only adverted to in the course of argument. For the same reasons it would be inappropriate to discuss the important matters decided in *Whybrow's Case* (1), beyond pointing out that it does not bear on the question now standing for decision, namely, whether or not the Board is authorized by law to entertain this appeal.

Their Lordships are of opinion that it is not so authorized. Whatever may be the power of the Commonwealth in regard to industrial disputes, whether or not that power must be exerted in harmony with State laws or State awards, it is at all events clear that the field of legislation and of consequent determination in obedience to laws so made is divided between State and Commonwealth, and these are constitutional powers because they spring from constitutional sources.

The able but necessarily difficult arguments of Mr. Lawrence and Mr. Romer were directed to show that the decision of the High Court in the present case was not upon a question as to the limits inter se of Commonwealth and State powers. They said that it did not decide any conflict of powers and could not impair the power of the State, and therefore was not concerned with limits inter se, laying emphasis upon the two Latin words. Let it be supposed that no conflict has arisen and that the powers of the State could not be so impaired. These considerations do not, in their Lordships' opinion, furnish the test.

(1) 10 C. L. R. 278.

Their Lordships consider that the High Court decided, first, that the dispute before them was one extending beyond the limits of one State; and secondly, that the President had jurisdiction to make his award under the legislation of the Commonwealth passed pursuant to their constitutional powers. The High Court decided that the frontier of the Commonwealth power reaches in this case into the State, and it therefore followed that the State has not exclusive, if any, power in this case. This appears to their Lordships to be a question as to the limits inter se of the several powers, however much or little the Commonwealth may be required to conform to State laws or State awards, and however much or little the State may impose laws upon its own subjects.

Their Lordships will therefore humbly advise His Majesty that by the Commonwealth of Australia Constitution Act, 1900, s. 74, no appeal is permitted to His Majesty in Council from the judgment of the High Court in this case. The appellants will pay the respondents' costs.

Solicitors for appellants : *Donald, McMillan & Mott.*

Solicitor for respondent Federation : *W. W. Jones.*

Solicitors for interveners : *Coward & Hawksley, Sons, & Chance ; Light & Fulton.*

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May 15.

SINNETAMBY CHETTY APPELLANT ;

AND

ELSIE DE LIVERA AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Roman-Dutch Law—Mala Fide Possession—Impensae Utiles—Compensation.

Whether or not under Roman-Dutch law as administered in Ceylon a mala fide possessor of land is ever entitled to compensation for impensae utiles, a person who has acquired possession knowing that he is invading the rights of others cannot recover compensation for works which are not authorized by the owners of the property and which he knows alter its character.

APPEAL from two decrees of the Supreme Court of Ceylon (March 6, 1914) affirming and reversing respectively decrees of the District Judge of Galle.

The suit related to land and a family residence which had formed the ancestral estate of a Singhalese proprietor who died in 1884, and was disposed of by his will made in 1860. The appellant in 1903 acquired possession of the property under conveyances by Mary de Livera, the widow of a grandson of the testator, and an agreement by her and her eldest son which recited that the will created an entail and agreed to break the entail and obtain the consent of those who would be entitled thereunder.

The appellant while in possession set up upon the property an oil-mill, lime-kiln, and public bathing stations; he also erected thereon stores, cattle-sheds, and other buildings.

In 1913 the respondents sued for partition. They contended that the will created a fidei commissum, and that they were entitled thereunder to a life interest in a two-thirds share. The appellant relied upon the conveyances and agreement; he further claimed that in any case he was entitled to compensation for his expenditure upon the works above referred to.

Both Courts in Ceylon held that upon the true construction of

* *Present* : EARL LOREBURN, VISCOUNT HALDANE, LORD SUMNER, and LORD PARMOOR.

the clauses of the will a valid fidei commissum was created for four generations and that the respondents were entitled thereunder. Those decisions were affirmed by their Lordships. The present report is confined to the proceedings upon the appellant's claim to compensation.

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Upon that question the District Judge found that the appellant knew that the property belonged to others and that he was consequently a mala fide possessor. He found that the works were not necessary, nor such as the respondents would have carried out. He held, however, that the stores, a cattle-shed, and certain other buildings were impensae utiles in that they enhanced the value of the property, and he awarded the appellant Rs.5456 compensation in respect of them.

Upon appeal to the Supreme Court the claim to compensation was disallowed. The learned judges (Wood Renton C.J. and Ennis J.) accepted the finding that the appellant had improved the property to the amount of Rs.5456. They, however, held, following the decision in *General Ceylon Tea Estates v. Pulle* (1), that a mala fide possessor, as they held the appellant to be, was not entitled to compensation for impensae utiles.

1917. May 15. *Sir Erle Richards, K.C., and Kenworthy Brown* (for *Arthur Page*, serving with His Majesty's Forces). The appellant merely had notice of a title in others and was not a mala fide possessor. Further, the decision in *General Ceylon Tea Estates v. Pulle* (1) was not in accordance with Roman-Dutch law. There is a conflict of authority between the Roman-Dutch jurists upon the question. The Cape Supreme Court have adopted the view of Groenewegen, Van Leeuwen, Voet, and Storer that a mala fide possessor is entitled to compensation for impensae utiles: *Maasdorp*, 2nd ed., vol. 2, p. 56, citing *Bellingham v. Bloommelje* (2), *De Beers Consolidated Mines v. London and South African Exploration Co.* (3), and *Colonial Government v. Smith & Co.* (4) In the first of those cases De Villiers C.J., after considering the views of the various jurists, said that the weight of authority was in favour of the above proposition.

(1) (1906) 11 Ceylon N. L. R. 98.

(2) (1874) 4 Buch. 36.

(3) (1893) 10 Cape S. C. R. 359.

(4) (1901) 18 Cape S. C. R. 380.

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[LORD SUMNER. Was not the Supreme Court of Ceylon entitled to adopt the view of Grotius and Van der Keessel to the contrary ?]

In the earlier case of *Tikiri Banda v. Gamagedera* (1) in the Supreme Court of Ceylon Berwick J. considered the jurists and came to the same conclusion as De Villiers C.J., though no decision of the Court was given.

P. O. Lawrence, K.C., and *Sproule*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

EARL LOREBURN. Their Lordships are of opinion that this will create a fidei commissum which prevented Mary de Livera from disposing of this property, and also prevented both of her uncles and her son from doing so to the prejudice of the plaintiffs. It was admitted in argument that if there is a fidei commissum these parties could not alienate to the appellant, and it follows that the plaintiffs have made out their title.

The judgments appealed from are admirably clear, and dispense with any need for travelling over the ground again.

In regard to the claim for compensation, the claim of right by a trespasser to compensation for money he has expended in impensae utiles involves a wide principle. It does not seem to be necessary to scrutinize the various dicta of learned writers, none of which are exhaustive, or to enter at all upon the law in South Africa, as to which no question arises in the present case. An abstract proposition that a person who is not acting bona fide can get compensation does not carry any one the whole length. Obviously it must also be considered whether, if the mala fides involves fraud, any compensation could possibly be recovered. Also it would be necessary to inquire what are impensae utiles, and whether the measure of compensation should be the enhanced market value. This does not arise for decision in the present case; nor is it necessary to enter upon the decision in *Pulle's Case*. (2) Their Lordships think that the circumstances of the present case do not render it necessary to consider the principle of that decision.

In the facts of the present case the appellant was not acting bona fide. He knew the risk, he knew the facts, showing that

(1) (1880) 3 Ceylon S. C. Cir. 31.

(2) 11 Ceylon N. L. R. 98.

he was a mere trespasser in what he did, and he knew that he was invading the rights of the heirs, and knew that Mary de Livera had no right to alienate, and knew he was altering the character of this property without the consent of the persons whose interest it was to preserve it, and without any authority from any one except the trustee whose duty it also was to preserve it. Their Lordships think, in such a case as this, it is quite impossible to suppose that compensation would be payable ; and they will humbly advise His Majesty that this appeal should be dismissed with costs.

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Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondents : *O. A. Cayley.*

[PRIVY COUNCIL.]

AUSTRALIAN ALLIANCE ASSURANCE COM- } APPELLANTS ;
PANY, LIMITED }
AND
ATTORNEY-GENERAL FOR QUEENSLAND }
AND OTHERS } RESPONDENTS.

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[AND CONSOLIDATED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Queensland—Workers' Compensation—Approval of Insurance Companies—Discretion of Governor—Obligation of Employer—Workers' Compensation Act, 1916 (6 Geo. 5, No. 35, Queensland), ss. 7, 8.

Upon the true construction of s. 7 of the Workers' Compensation Act, 1916 (Queensland), the Governor in Council has an absolute discretion whether or not to "approve that" a company carrying on in Queensland the business of accident insurance may continue to carry it on. A company is not entitled to approval as of right upon making the maximum deposit provided by s. 7, sub-s. 2. An employer who has obtained a policy from an approved company is nevertheless under an obligation by s. 8 to obtain a policy from the Insurance Commissioner.

CONSOLIDATED APPEALS from two judgments of the Supreme Court of Queensland (July 18, 1916).

The Workers' Compensation Act, 1916 (6 Geo. 5, 1916), of Queens-

* *Present* : EARL LOREBURN, VISCOUNT HALDANE, LORD ATKINSON, LORD SUMNER, and LORD FARMOR.

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land repealed all prior legislation of the State as to workmen's compensation, and established a State Insurance Office under the control of an Insurance Commissioner, who was to issue to employers policies guaranteed by the State. The appeal related to the right of a company carrying on the business of accident insurance to continue to carry it on, and to the effect of the grant of an approval to its doing so. The material parts of ss. 7 and 8, upon which sections those questions chiefly depended, appear from the judgment.

The appellants were a company which for many years prior to the passing of the Act had carried on in Queensland the business of accident insurance. After the passing of the Act they applied to the Governor in Council for approval under s. 7, and subsequently paid into the Treasury the maximum security provided by s. 7, sub-s. 2.

No approval having been granted to them, and the Governor having failed to appoint at their request a nominal defendant under the Claims against the Government Act, the appellants on April 13, 1916, commenced an action against the Attorney-General and the Insurance Commissioner. They claimed that they were entitled to approval under s. 7 and to carry on the business of accident insurance in the State; further, that certain regulations under the Act were ultra vires. They prayed for an injunction and claimed damages.

Cooper C.J. granted an interim injunction and referred certain questions of law to the Full Court.

The Full Court (Cooper C.J. and Real, Chubb, Shand, and Lukin JJ.) by their judgment delivered on June 13, 1916, held in effect: (1.) (Cooper C.J. and Lukin J. dissenting) that the Governor had an absolute discretion under s. 7; (2.) that under s. 8 it was obligatory upon an employer to obtain a policy from the Insurance Commissioner, even if the employer was insured by an approved company; Cooper C.J. and Lukin J., however, held that the only result of non-compliance was that the Commissioner was entitled to recover from the employer the amount of any compensation paid out of the State fund to a worker employed by him. It was further held that certain regulations were ultra vires, but no question thereon arose in the appeal. The proceedings are fully reported at 1916, St. R. Qd. 225.

On July 6, 1916, judgment was entered in the action in accordance with the view of the majority of the Full Court, and on July 18, 1916, an appeal to the Full Court was by arrangement dismissed without further argument.

A nominal defendant having been appointed after the issue of the writ, a similar action, the subject of the consolidated appeal, was commenced against him. That action was similarly disposed of by judgments of July 6 and 18, 1916.

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1917. May 4, 7. *Sir John Simon, K.C.*, and *Hon. M. Macnaghten*, for the appellants. Sect. 7 provides that approval "shall be granted upon" the deposit being made. The appellants were entitled as of right to approval. [Reference was made to *Rex v. Christ's Hospital Governors*. (1)] The provisions of s. 7 and the definition of "insurer" in s. 3 show that the Legislature contemplated that the insurance companies should grant policies to employers. In the case of conflicting provisions of a statute effect should be given to the leading provision: *Institute of Patent Agents v. Lockwood*. (2) If an employer who is insured by an approved company has under s. 8 also to be insured by the State, the provisions for the approval of companies are illusory. The penalties under s. 8 are in respect of "each uninsured worker," but if the employer is insured by a company he has no uninsured workers. The business referred to in s. 7 as that which an approved company can carry on is that of insuring an employer against his liability to reimburse the State fund.

Clauson, K.C., and *Micklethwait*, for the respondents (who were only called upon as to the first contention). Sect. 7 says that the Governor "may" approve. He has an absolute discretion. There is a distinction between the approval by the Governor and the grant of the approval. The word "upon" in relation to the deposit should be read as "subject to."

Hon. M. Macnaghten replied.

1917. June 15. The judgment of their Lordships was delivered by LORD SUMNER. These are consolidated appeals in two actions, which in substance were brought to assert rights and to obtain

(1) [1917] 1 K. B. 19.

(2) [1894] A. C. 347, 360.

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relief under s. 7 of the Queensland Workers' Compensation Act of 1916; but s. 8 of that Act also came in question, and, further, the validity of various regulations made under the Act. These regulations, however, are not now material. In the course of the proceedings it was ordered that certain questions of law should be argued, and these appeals contest only the answers given to the questions which arose upon the above-named ss. 7 and 8.

The Workers' Compensation Act of 1916 repealed the previous Workers' Compensation Acts and Employers' Liability Acts and took their place. Under them, companies, like the appellants, had insured employers against their liability to workmen for industrial accidents. Sect. 7 of the new Act fixes the conditions upon which thereafter they may carry on in Queensland the business of "accident insurance," that is to say, "insurance against liability in relation to workers' compensation under this Act."

The section is threefold. First, "the Governor in Council may approve that any company" (such as the appellants are) may carry on the business of accident insurance. Secondly, "such approval shall be granted upon such applicant giving security" to a maximum amount of 5000*l.*, "or such less sum as the Treasurer may fix." Thirdly, "on the making of such deposit, the Governor in Council shall grant to the applicant a certificate to the effect that such deposit has been made, and that the Governor in Council has approved that the applicant may carry on in Queensland the business of accident insurance." These are three separate things, and the words "may approve" and "shall be granted" are significant. The Governor in Council acts as chief of the Executive, and acts constitutionally on the advice of his Ministers. Approval or disapproval is an act involving a choice, which (subject to his constitutional obligation) is his choice. This act, therefore, is not merely ministerial. He approves or disapproves in his discretion. If he disapproves, there is an end of the matter. No appeal lies from his refusal to approve, nor is he subject in this matter to control by any Court. If he approves, then, and only then, there arises a question as to the grant of that approval, that is, a grant to the applicant. Its form is prescribed—the grant is by certificate; and a condition of the grant, performable by the applicant, is also prescribed, namely, the deposit of money by way of security.

To avoid any question with the Treasurer, who would clearly have had a discretion in fixing the security at less than the maximum, the appellants deposited the whole 5000*l.*, and then applied to the Governor for his approval as a matter of right. In his discretion he withheld approval, and the appellants brought these actions to enforce what they now allege to be his statutory duty towards them. In their Lordships' opinion these actions so far fail. There is no such statutory duty as is alleged.

If relief under s. 7 cannot be obtained, little more need be said, the regulations being no longer in question. Sect. 8 provides that "it is obligatory for every employer to obtain from the Insurance Commissioner a policy of accident insurance for the full amount of the liability to pay compensation under this Act to all workers employed by him." The employer is liable to the Commissioner under the Act to reimburse to him his payments to the injured worker or his dependants, for, under the scheme of the Act, these are recoverable from the Commissioner directly, and, by the first words of the section, it is this liability that the employer must cover with the Commissioner as a State insurer.

The appellants say that to impose such an obligation on the employer would make the business of accident insurance futile, even if they were to obtain leave to carry it on under s. 7. Probably it would, for no one would take out a second policy with the appellants after effecting a first policy with the State Commissioner, covering the same subject-matter and the same liability. This is, however, what the section says, and it cannot be read otherwise without rewriting it. The provision is not unexpected, since under s. 7 the Governor in Council is already free to exclude such companies from this field of business altogether, and s. 8 only does indirectly what he may do directly. Their Lordships are not concerned with the policy of the Act, nor can they find, either in the novelty of the provision or in the language of other parts of the Act, such as the penalty clause in s. 8, sufficient ground for disregarding the plain words of the enactment. During the argument before the Supreme Court of Queensland there appears to have been some suggestion that one section gave only that the other might take away, as the result of a legislative accident. It may be so. Since, for all its vigilance, no Legislature can be immune

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J. C. from such mishaps, no Legislature need shrink from promptly
 1917 correcting its error, if error there be; but, be this as it may, the
 AUSTRALIAN matter is wholly for the Legislature itself and can have no bearing
 ALLIANCE upon the interpretation of the language of the enactment.
 ASSURANCE In the result their Lordships are of opinion that, so far as the
 COMPANY, questions of law raised by these appeals are concerned, they were
 LIMITED correctly answered by the judgments appealed against, and they
 v. will humbly advise His Majesty that the appeals should be dismissed
 ATTORNEY- with costs.
 GENERAL
 FOR
 QUEENS-
 LAND.

Solicitors for appellants: *Dawes & Sons.*

Solicitors for respondents: *Freshfields.*

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DAVIDSON APPELLANT ;

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AND

COMMISSIONER OF TAXES RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH
 AUSTRALIA.

Australia (South)—Income Tax—Company—Profits—Taxation Act, 1884
(46 & 47 Vict. No. 323, S. Austr.), s. 12, sub-s. 12.

The Taxation Act, 1884, of South Australia imposes an annual income tax in that State and provides by s. 12, sub-s. 12, that the taxable income of a company shall be the profits divided, together with profits carried to any reserved fund, or capitalized in any way.

A mining and smelting company treated all its moneys, including shareholders' capital and borrowed money, as one common fund, accumulated stocks of metal not forming part of this fund until sold. All payments were made out of this fund without being appropriated to any particular source. During 1903 the company sold a large accumulation of metal, upon which all production charges had been paid, and out of the proceeds and new produce paid off 80,000*l.* of debentures and 20,774*l.* of deposits, and erected new works at a cost of 16,007*l.* They further in 1903 wrote off for depreciation of works 22,469*l.*, that sum being in fact provided

* *Present* : EARL LOREBURN, VISCOUNT HALDANE, LORD ATKINSON,
 LORD SUMNER, and LORD PARMOOR.

out of profits which the company would have been entitled to divide :—

Held, that the company was taxable for the year 1903 upon each of the amounts of 80,000*l.*, 20,774*l.*, and 16,007*l.* as profits capitalized, and upon the 22,469*l.* as profits carried to a reserved fund.

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APPEAL from a judgment of the Supreme Court of South Australia (June 18, 1914) upon a special case stated by the Adelaide Local Court.

The appellant was the public officer of the Wallaroo and Moonta Mining and Smelting Company, Limited, and the appeal related to the amount upon which that company was liable to pay income tax for the year 1903 under s. 12, sub-s. 12, of the Taxation Act, 1884, of South Australia.

The judgment appealed from raised the taxable income from 8000*l.* to 147,694*l.* The facts, including the items of which the last-named amount consisted, appear from their Lordships' judgment, in which also the sub-section is set out. A judgment of the Supreme Court upon the case stated was delivered by Way C.J. on June 10, 1907; it indicated the principles upon which, in the opinion of that Court, the taxable amount should be ascertained, but stated that further inquiries were necessary in order to arrive at the precise figures. In 1910 the special case was referred to the Local Court for amendment, and the final judgment of the Supreme Court was delivered by Way C.J. on June 18, 1914. The judgments are reported at (1907) S. Austr. L. R. 64 and (1914) S. Austr. L. R. 207 respectively.

1917. May 8, 10, 11, 15. *Romer, K.C.*, and *Austen-Cartmell*, for the appellant. The company was liable only upon the items of 8000*l.* and 5444*l.* First, as to the 22,469*l.* written off in 1903 for depreciation. It was admitted before the Supreme Court that that amount was properly written off from the gross revenue as depreciation of works. It did not form part of the profits of the company within the meaning of the Act. That view is strongly supported by the judgment of Fletcher Moulton L.J. in *In re Spanish Prospecting Co.* (1) Other decisions as to the meaning of "profits"

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are not applicable. One line of authorities arose under the English Income Tax Acts—e.g., *Forder v. Handyside* (1) and *Alianza Co. v. Bell*. (2) Those cases either dealt with “annual value” under Sched. A, or they arose under Sched. D, in which case by s. 159 of the Income Tax Act, 1842, a deduction for diminution of capital was expressly disallowed. The other line of authorities dealt with what were profits which a company was entitled to divide—e.g., *Lee v. Neuchatel Asphalte Co.* (3), *Verner v. General and Commercial Investment Trust* (4), and *Dovey v. Cory*. (5) Neither class of case deals with the bare question whether the gross revenue of a company such as this, without a proper deduction for depreciation in the year, can be considered profits for the year. There are, however, passages in the judgments in the last two cited cases which support the appellant. Secondly, as to the sums arising from the sale of accumulated stocks and applied to discharge debentures and deposits, and for addition to fixed capital. These sums were not paid out of profits made in 1903. The true inference is that they were paid out of capital. Any profits made prior to 1903 which were applied towards the payments in question were capitalized in previous years and could not be brought into the year 1903.

P. O. Lawrence, K.C., and *Whinney*, for the respondent. The whole of the disputed items were profits from ordinary trading in 1903. The word “profits” in the Taxation Act, 1884, means the excess of receipts from the business over the outlay for the business before making any fixed or conventional allowance for depreciation. The admission was merely that the depreciation was such as a prudent trader would make. The proceeds of sale of accumulated stocks, upon which all costs of production had been paid, were profits in 1903. The tax is upon income. The profits for a year are not affected by variations in the value of assets. No distinction in principle can be drawn between the 5444*l.*, as to which liability is conceded, and the other items claimed as capitalized profits.

[They were stopped.]

Romer, K.C., replied.

(1) (1876) 1 Ex. D. 233.

(2) [1905] 1 K. B. 184; [1906] A. C. 18.

(3) (1889) 41 Ch. D. 1.

(4) [1894] 2 Ch. 239.

(5) [1901] A. C. 477.

June 18. The judgment of their Lordships was delivered by

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VISCOUNT HALDANE. In this appeal the question is upon what amount the Wallaroo and Moonta Mining and Smelting Company, Limited, represented by the appellant as its public officer, is assessable for income tax in the State of South Australia on the profits for the year ending December 31, 1903. The Taxation Act, 1884, of the State Legislature imposes a general tax on incomes. This is to be levied on various descriptions of income specified in the first ten sub-sections of s. 12. Sub-s. 11 provides that the net income, as ascertained in accordance with the rules laid down in the preceding sections, and after making the deductions therein provided, shall be the taxable amount, except in the case mentioned in sub-s. 12. This sub-section prescribes the taxable amount of the income in the case of a company, making this amount depend on the profits, whether divided, carried to any reserve, or in any way capitalized. Its language is as follows: "In the case of the income of any taxpayer being a company dividing its profits amongst its members . . . the taxable amount shall be deemed to be the amount of profits so divided, with the addition of any amount of profit carried to any reserved fund or capitalized in any way."

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The appellant made a return of the taxable income within this definition as 8000*l.* for the year in question. The Local Court of full jurisdiction at Adelaide, after a prolonged investigation, stated a special case for the Supreme Court, and the Supreme Court finally decided that the true amount was 147,694*l.* 10*s.* 4*d.*, made up of certain items detailed in the judgment as follows:—

| | £ | s. | d. |
|--|----------|----|----|
| 1. Profits divided— | | | |
| Dividend | 8000 | 0 | 0 |
| 2. Profits carried to a reserve fund— | | | |
| Depreciation written off | 22,469 | 2 | 0 |
| 3. Profits capitalized in any way— | | | |
| Additions to fixed assets | 16,007 | 5 | 1 |
| Additions to fixed assets written off to
working expenses | 5444 | 3 | 3 |
| Debentures discharged (less 5000 <i>l.</i> already
taxed) | 75,000 | 0 | 0 |
| Deposits paid off | 20,774 | 0 | 0 |
| | £147,694 | 10 | 4 |

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As to the items of 8000*l.* and 5444*l.* 3*s.* 3*d.*, no question is raised by the appellant. The decision as to the other items depends on a single question of principle: "Were these sums profits made during the year 1903, whether divided, carried to reserve, or capitalized?"

The company, which came into existence in 1890, had acquired the Wallaroo and Moonta mines, and had carried on the business of mining, smelting, and extracting copper and precious metals from ores. The nominal capital was 400,000*l.* divided into 200,000 shares of 2*l.* each, of which 40,000 had not been issued. A few years later it extended its works and plant, and for this purpose, in 1898, it raised 80,000*l.* in debentures. Its business prospered, and from time to time it divided large sums in dividends. Prior to 1903 it appears to have employed a substantial part of the profits in making additions to fixed capital to counterbalance amounts written off for depreciation. It also appears to have made further additions and improvements to the works, which were debited in the profit and loss accounts under the general heading of "working expenses." It was not, however, until the balance-sheet for 1903 appeared that the revenue authorities had their attention drawn to the fashion in which profits had been disposed of in capital expenditure of these and other kinds and in reduction of capital liabilities. No question has been raised in the present litigation as to the propriety of not including the part of the profits so disposed of during the years before 1903 in the annual returns for income tax. The only question is whether in 1903 the profits of the year were applied in making up a reserve fund for depreciation, in adding to fixed capital, and in paying off debentures and deposits, in the mode described in detail at the end of the judgment of Way C.J. in the Supreme Court. For if the profits were so disposed of it is plain that the company was liable to pay income tax upon them under the words of s. 12, sub-s. 12, already quoted. Before going further, their Lordships desire to say, having regard to the character of the business and the way in which it was conducted, that an investigation of the accounts presented has satisfied them that there was nothing in any law forbidding the payment of dividends out of capital which in the year 1903 would have interfered with the treatment by the company of the amounts in question as profits

available for division, had this course been decided on. Apart from the fact that the original capital raised by the issue of shares was in reality intact, the general assets appear to have been steadily increased by the accumulation of ore capable of being disposed of at a profit. When this ore was disposed of it seems to have been the practice of the company to apply, out of the prices received, substantial sums in reduction of loans and in other ways which increased the balance of assets over liabilities. The details of these operations, which were performed over a series of years, are nowhere to be found disclosed with fulness in the annual balance-sheets or profit and loss accounts. But when these documents are read in the light of the annual reports it is not difficult to understand the operation of the method adopted.

Their Lordships now turn to the accounts. The balance-sheet of December 31, 1902, shows a liability on the debit side of 80,000*l.* in first mortgage debentures. This amount disappears in the balance-sheet of December 31, 1903. As to this disappearance, it is necessary to turn to two further documents in order to make it intelligible. The first of these is the profit and loss account of 1903, which shows the extinction of 5000*l.* by means of a debenture redemption fund of that amount provided out of profits. This account also contains a credit item described as "Balance of copper account, 312,452*l.* 11*s.* 4*d.*" What is meant by the use of the word "balance" does not appear in the account itself, but there is a directors' report annexed to it which makes clear what had been done. This report says: "The price obtained for copper during the year was 5*l.* 14*s.* 1*d.* more than during 1902. This, together with the gradual realization of all surplus ores and products, has enabled the board to pay off the whole of the debentures and nearly all the bank overdraft and deposits."

The latter amounted together to 20,774*l.*, and form the item of that amount which appears in the judgment of the Supreme Court.

The appellant gave evidence on behalf of the company before the Local Court, and in the course of it stated that "Including debentures, the liabilities of the company were reduced in 1903 by 100,774*l.* In addition, 15,700*l.* was spent on plant. The money came from produce and realization of assets on hand at beginning of the year, after paying all charges shown in the accounts, except

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some which were only estimated. The assets were substantially produce on hand from preceding years." What these assets were is perfectly clear. They were mineral produce on which the cost of production had been paid and which were in hand for realization as available profit of operations in the year 1903.

This disposes of the largest items in the list of those on which the Supreme Court decided that the company should be assessed for income tax. There remain two further items appearing in that list, the 22,469*l.* 2*s.* written off for depreciation and the 5444*l.* 3*s.* 3*d.* of additions to fixed assets written off to working expenses. As to the latter item, it has been admitted by the appellant that this must be taxed as being a payment out of profits. As to the former, the details which make it up appear in the report for 1903, and from this, supplemented by the profit and loss account for the year, it is evident that the whole amount was paid out of profit. It is true that in the accounts there is little that amounts to specific appropriation. The reason is the peculiar practice of the company in making out these accounts. That practice was, as pointed out by Way C.J., to treat all the moneys of the company, whether derived from the original shareholders' capital, borrowed, got by the sale of products, or in any other way, as one mixed or common fund. Out of this common fund all payments were made, and the payments were not appropriated to any of the sources of the fund. One consequence of this practice is that there is nothing in the accounts to show the amounts of money attributable to these sources which were carried to reserve or spent in extensions or improvements of the works. But even if there had been such an appropriation, it would not have affected the fact that the amount thus written off for depreciation in 1903 was provided out of profits which quite legitimately could have been divided. Their Lordships agree with an observation made by Way C.J. in this connection : "Moreover," said that learned judge, "knowing that the Commissioner would have assessed the amounts expended on the extensions of the company's works if he had understood that a reserve had been created or was being capitalized, the company paid for such works out of the common fund and purposely refrained from appropriating the payments against what was written off for depreciation or any constituent portion of the common fund.

Besides all this, the company had escaped taxation year after year by denying in its taxation returns that it had carried profits to a reserved fund or capitalized profits in any way. Although I disclaim imputing to the company any intentional misrepresentations, I do not understand how it justifies the denial year after year that it carried any profits to a 'reserved fund.' The reserve for depreciation was as much a 'reserved fund' as the 5000*l.* expressly set aside in 1898 as a 'debenture redemption fund' and the company could not help knowing that the Commissioner, in refraining from assessing the amount written off for depreciation, was acting on the faith of the company's denial year after year that any profits were being carried to a reserved fund."

It is sufficient for their Lordships to say that with this view of the proceedings of the company they are in accordance, and that, for the reasons which they have given, they agree with the rest of the judgment of the Supreme Court and with the particular findings in which that judgment resulted.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Blyth, Dutton, Hartley & Blyth.*

Solicitors for respondent : *Sutton, Ommaney & Co.*

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June 21.

[PRIVY COUNCIL.]

THE CONSUL CORFITZON.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Practice—Discovery—Enemy Destination—Prize Court Rules, 1914, Order IX., r. 1.

A cargo of hides and tanning materials consigned in a Swedish ship from South America to a Swedish port was seized in September, 1915, in the course of the voyage. A writ was issued claiming the condemnation of the cargo as contraband. The consignee, a Swedish subject, claimed the cargo and alleged by his affidavits that it had been bought by him partly for his tanning business in Sweden, and partly for sale to customers in that country. The President made the following order for discovery: "that the claimant do within twenty-one days make discovery on oath of all books of account, letter books, and usual commercial documents relating to the matters in question, including the claimant's business books from January 1, 1914, up to the date of seizure, showing all purchases from the shippers of the goods seized during the same period, or of goods similar thereto, and of the sales of such goods by the claimants, and all contracts, policies of insurance, cables and correspondence relating to the said purchases and sales; and also the same books and documents relating to such goods, or goods similar thereto, which were sold by the claimant for delivery in Germany during the same period." The order was made subject to evidence being filed that the Procurator-General had reason to suspect that the cargo had an enemy destination:—

Held, that there was jurisdiction under Order IX., r. 1, of the Prize Court Rules to make the order, that the documents particularized therein related to the question in the action, and that the discretion of the President to make the order should not be interfered with.

APPEAL from an interlocutory order of the President of the Admiralty Division, sitting in Prize.

The Swedish steamship the *Consul Corfitzon*, while on a voyage from South American ports to Karlskrona in Sweden, put into Swansea in September, 1915, and her cargo, consisting of hides and tanning materials, was there seized as prize. A writ was issued in November, 1915, claiming condemnation of ship and cargo on the

* *Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

ground that the cargo was contraband. The consignee (appellant), a Swedish subject, claimed the cargo. By affidavits, to which certain documents were exhibited, he alleged that the cargo was bought by him partly for the purpose of his tanning business in Sweden, and partly for sale to his Swedish customers.

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On October 24, 1916, the President of the Admiralty Division made the order for discovery set out in the head-note. The order was made in chambers, after hearing counsel, and followed in form a previous order made by the President in *The Kronprinz Gustaf Adolf* (1), the application in that case having been adjourned into Court for argument.

At the time of making the order the President directed that evidence should be filed to the effect that the Procurator-General had reason to suspect that the goods had an enemy destination. An affidavit by an assistant in the department of the Treasury Solicitor was accordingly filed which stated, *inter alia*, as follows :

“From certain intercepted wireless messages and cables I have reason to believe that an agent in Buenos Aires of a Hamburg firm was in communication with the claimants (the charterers of the above ship) and his said principal with regard to the shipment of hides and quebracho extract on the said ship, and that the claimants were willing that such shipment should be made if it could be arranged.”

The learned President gave leave to appeal.

1917. May 21, 22. *Roche, K.C.*, and *R. A. Wright*, for the appellant. There was no jurisdiction to make the order. The jurisdiction to order discovery is conferred by Order ix., r. 1, of the Prize Court Rules (2) ; it is confined to ordering an affidavit in the form provided in those rules, with power to limit the class of document

(1) Unreported.

(2) Order ix., r. 1 : “Any party to a cause or matter may, upon filing an affidavit, apply to the judge for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein, and the judge

shall make such order, either generally or limited to certain classes of documents, as he may think fit. Provided that discovery shall not be ordered unless the judge shall be of opinion that it is necessary either for disposing fairly of the cause or for saving costs.”

J. C. to be included. The rule is based on the Rules of the Supreme
 1917 Court, Order XXI., r. 12. The particularized documents were not
 THE CONSUL relevant to any issue raised. The affidavit on behalf of the respon-
 CORFITZON. dent was too vague to raise any issue of enemy destination, or
 ————— at any rate to make it reasonable that the discovery should be
 ordered. The relevance of the Swedish War Trade Law, 1916 (1),
 is that it precludes the respondent from saying that if the appellant
 had an honest case he would be willing to disclose the documents.

Sir Frederick Smith, A.-G., and T. Mathew, for the respondent.
 The issue of enemy destination was clearly raised by the writ and
 by the claimant's affidavits. The particularized documents are
 relevant to that issue: *Compagnie Financière du Pacifique v.*
Peruvian Guano Co. (2) They were properly ordered to be included.
 Until the Rules of 1914 were made the practice was to administer
 the standing interrogatories, which were of the most searching
 character. (See (1799) 1 C. Rob. 381 and (1854) 1 Spinks, Ecc. &
 Adm., Appx. XI.)

Roche, K.C., in reply. The standing interrogatories were in the
 nature of cross-examination of the witnesses and were directed to
 particular transactions.

June 21. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. This is an appeal from an order
 made by the President on October 24, 1916, requiring the appellant
 to make discovery on oath of all books of account, letter-books, and
 usual commercial documents relating to the matters in question in
 the litigation, including the books, contracts, policies of insurance,
 cables, and correspondence in the order particularly referred to.
 The appellant contends that this order ought to be discharged or
 varied (1.) because there was no jurisdiction to make it, (2.) because
 it was wrong in law, and (3.) because it was in the circumstances of
 the case oppressive, and as a matter of discretion ought not to have
 been made.

(1) The law referred to was another party's dealings, should
 directed against the restriction of co-operate in any supervision by
 exports and imports, and by a foreign Power with reference to
 article 3 imposed penalties upon imports or exports or their dis-
 any Swedish subject who, by infor-posal.
 mation concerning his own or (2) (1883) 11 Q. B. D. 55, 63.

There can be no doubt that, under Order IX., r. 1, of the Prize Court Rules, the President sitting in prize has power to make an order for the discovery of documents relating to the matters in question, either generally or limited to certain classes of documents to be specified in the order. In the present case the discovery is limited to books of account, letter-books, and usual commercial documents, and so far the order is not complained of. It is contended, however, that the order ought to have stopped at this point, and that in further particularizing the documents of which discovery was to be made the President exceeded his powers under Order IX., r. 1. He ought, it was said, to have left it to the judgment or conscience of the person against whom the order was made to decide what documents ought and what need not be included.

In their Lordships' opinion this contention cannot be upheld. It is by no means easy for a litigant, however sound his judgment and however scrupulous his conscience, to come to a correct conclusion as to what documents do or do not relate to the matters in question within the meaning of the rule. The principle applicable was laid down in *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1) "Every document," said Brett L.J., "relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not which *must*—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences." But even if this principle be borne in mind, there is such ample room for error in its application that it is, in their Lordships' opinion, not only permissible, but in many cases highly convenient, that the judge who makes the order should indicate as far as may be the kind of document of which he contemplates that discovery shall be made. The objection to jurisdiction therefore fails.

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(1) 11 Q. B. D. 55, 63.

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The second objection to the President's order is that he has specified among the documents of which discovery is to be made documents which cannot by any possibility relate to the matters in question in the litigation. Before considering this objection it is necessary to see what these matters are.

The proceedings in which the appeal arises are proceedings on behalf of the Crown for condemnation as contraband of war of about 2843 tons of salted hides, 3550 tons of quebracho logs, and 201 tons of quebracho extract shipped on board the Swedish steamship *Consul Corfitzon*, from South American ports to Karlskrona, and consigned to the appellant. There is an alternative claim under the Order in Council of March 11, 1915, which is immaterial for the purposes of this appeal.

The goods having been shipped in a neutral vessel, and ostensibly destined for a neutral port, can only be contraband of war if, on the principle of continuous voyage, and according to the real intention of the parties concerned in the transaction, they had a further or ultimate destination in an enemy country. Intention is rarely the subject of direct evidence. As a rule it has to be inferred from surrounding circumstances, and every circumstance which could, either alone or in connection with other circumstances, give rise to an inference as to the intention of the parties concerned in a transaction both relates and is relevant to the question what that intention really was.

In the present case one of the matters in question is how the appellant intended to dispose of the goods to which these proceedings relate after their delivery at Karlskrona. Were they intended by him for consumption in Sweden, or had they a further destination, and if so in what country? It appears to their Lordships to be beyond dispute that inferences on this question might properly be drawn from the course and nature of the appellant's business in goods of a similar nature both before and after the outbreak of the present war, and in particular from the volume of his trade with Germany before and since such outbreak. All documents which throw light on these matters must therefore fall within the principle laid down in the case above referred to. The order for discovery being limited to documents which may throw light on the nature and course of the appellant's business and the volume of his trade with

Germany for some months before the war and since the outbreak of the war, it is in their Lordships' opinion impossible to hold that the order was wrong in law.

The objection that the order appealed from is oppressive is, in their Lordships' opinion, equally untenable. No doubt in interlocutory matters, such as discovery of documents, the judge in prize has a wide discretion which ought, of course, to be exercised so as not to impose upon neutrals any unnecessary difficulty in the speedy establishment of their claims. But, on the other hand, it would be wrong to subordinate the interests of the Crown to the mere convenience of adverse claimants. Considering the nature of the matters in issue in these proceedings, a refusal of the discovery ordered might deprive the Crown of all means of proving that the goods in question were contraband of war. On the other hand the discovery ordered is so limited that it cannot involve the appellant in any great trouble or expense. It must be remembered that full and complete discovery by the claimant may be the best and readiest mode of establishing his own case if it be a good one. At any rate, their Lordships do not see their way to interfere with the President's discretion, which appears to have been exercised after full discussion, and in view of his wide experience in cases of this nature.

Some stress was laid in argument on the provisions of the Swedish War Trade Law of April 17, 1916, a translation of which is contained in the supplemental record. It was said that the appellant, if he complied with the order appealed from, would, or might, render himself liable to penalties under article 3 of that law. Their Lordships can hardly suppose that article 3 was intended to hamper Swedish subjects in asserting their rights in British Prize Courts. Indeed, the concluding clause of the article seems to authorize everything necessary for the assertion of such rights, and further it would appear to be possible for the appellant, if he feels any difficulty in this respect, to obtain the consent of his Government to complying with the order appealed from. But however this may be, their Lordships are clearly of opinion that a Court of Prize cannot properly be deterred from making what it conceives to be the appropriate order because a neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law. The substan-

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J. C. tive law administered by the Court is international law, which cannot
 1917 be affected by the municipal legislation of any one State, and its
 THE CONSUL practice and procedure are governed by the municipal law of the
 CORPITZON. State from which it derives its jurisdiction, and cannot be modified
 ———— by the municipal legislation of any other State.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs, including the costs of the petition for the admission of the supplemental record.

Solicitors for appellant : *Botterell & Roche.*

Solicitor for respondent : *Treasury Solicitor.*

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[IN THE HOUSE OF LORDS.]

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*Floods—Tort—Damage to Property—Reparation—Erection of Opus
 Manufactum in Bed of Stream—Interference with Natural Course of
 Stream—Extraordinary Rainfall—Vis Major.*

It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.

A municipal authority, in laying out a park, constructed a concrete paddling pond for children in the bed of a stream and altered the course of the stream and obstructed the natural flow of water therefrom. Owing to a rainfall of extraordinary violence the stream overflowed at the pond, and, as the result of the operations of the

* *Present* : LORD FINLAY L.C., LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD WRENBURY.

authority, a great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the town and damaged the property of two railway companies:—

Held, that the extraordinary rainfall was not a *damnum fatale* which absolved the authority from responsibility, and that they were liable in damages to the railway companies.

Kerr v. Earl of Orkney (1857) 20 D. 298 applied.

Nichols v. Marsland (1875-6) L. R. 10 Ex. 255; 2 Ex. D. 1 distinguished.

Interlocutors of the First Division of the Court of Session in Scotland affirmed.

APPEALS from interlocutors of the First Division of the Court of Session in Scotland affirming interlocutors of the Lord Ordinary.

The respondents, the Caledonian Railway Company and the Glasgow and South-Western Railway Company, brought actions against the appellants, the Corporation of Greenock, for reparation for damage done to their railways by flooding alleged to have been caused by works executed by the corporation in the channel of a natural stream. The two actions raised similar issues and were tried together.

On August 5, 1912, owing to an extraordinary rainfall, a stream, which flowed through Greenock, known as the West Burn, overflowed its banks and a large volume of water poured down a public highway, called Inverkip Road, into the town, causing much damage to various properties. The case made by the Caledonian Railway Company was that this overflow undermined and displaced a retaining wall at their Greenock West Station and otherwise damaged their property, and that the flooding was caused by certain works which the corporation had executed in the channel of the stream, such works having been so constructed as materially to obstruct the natural flow of the stream and being inadequate in form, disposition, and design to carry away the volume of water caused by heavy rain.

The case for the Glasgow and South-Western Railway Company (so far as it differed from the previous case) was that part of the water which came down Inverkip Road found its way into a garage on the south side of the road and accumulated against a wall standing between the garage and an open part of the West Burn, until the pressure became so great that the wall and garage

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were swept into the stream ; that their railway was carried across this stream by a culvert, the mouth of which was blocked by the debris ; and that the water then dammed up against the railway fence wall, which was on the top of the culvert, until the pressure from the water and the debris caused the wall to collapse so that the water rushed on to the railway and did considerable damage.

The corporation, by way of defence to these actions, denied that the damage was due to their operations, and alleged in the first case that it was caused by water coming from other sources, and in the second case that it was due to the inadequacy of the culvert provided by the railway company. Alternatively they pleaded that the rainfall on August 5 was unprecedented in its character and extent and was such that no one could reasonably have anticipated it and amounted to vis major. The facts are fully stated in the judgment of the Lord Chancellor.

The Lord Ordinary (Lord Dewar) held that the appellants were liable in each case.

The First Division of the Court of Session, owing to the importance of the questions submitted for determination, appointed the parties in each case to prepare minutes of debate in order that the opinion of the whole judges of the Court might be obtained. In the result the interlocutor of the Lord Ordinary was affirmed by a majority in each case—in the case of the Caledonian Railway Company by seven to six (Lord Mackenzie, Lord Skerrington, Lord Dundas, Lord Salvesen, Lord Guthrie, Lord Anderson, and Lord Dewar ; the Lord President, Lord Johnson, the Lord Justice-Clerk, Lord Cullen, Lord Ormidale, and Lord Hunter dissenting) ; in the case of the Glasgow and South-Western Railway Company by ten to three (Lord Johnson, Lord Mackenzie, Lord Skerrington, Lord Dundas, Lord Salvesen, Lord Guthrie, Lord Cullen, Lord Ormidale, Lord Anderson, and Lord Dewar ; the Lord President, the Lord Justice-Clerk, and Lord Hunter dissenting).

1917. April 30 ; May 1, 3, 4, 7, 8, 10. *Constable, K.C.*, and *Charles H. Brown* (both of the Scottish Bar), for the appellants. In neither case have the respondents discharged the onus upon them of showing that the damage to their property was caused by the overflow of the paddling pond : *Thomas v. Birmingham*

Canal Co. (1); *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (2) But, assuming that the appellants are wrong in this, the measure of their duty in the alterations they made in the course of the stream was the obligation to provide for a flood which might reasonably be anticipated. Whether this flood was a *damnum fatale* or not, it was not one which they were bound reasonably to anticipate. In *Fletcher v. Smith* (3) Lord Penzance discusses the question whether a man who makes a new and artificial watercourse is bound to construct it in such a manner that it would be capable of carrying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated in that locality, or whether he is bound to provide for any quantity of water which could possibly be discharged into it from any rainfall, however heavy, however unusual, and however contrary to all previous experience; and he expresses his preference for the former view. One has to strike the balance between two opposing principles—(1.) that a man is entitled to use his property in a way most beneficial to himself, and (2.) that he must use it in a way which does not injure his neighbour. See Erskine's Institutes, book II., tit. i., s. 2; tit. ix., s. 2. *Fletcher v. Rylands* (4), which was a case of a reservoir, has defined a certain class of acts which are dangerous to one's neighbour. Blackburn J., in delivering the judgment of the Exchequer Chamber, states the rule to be that a person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes must keep it in at his peril and is prima facie liable for the damage resulting from its escape, but suggests that he may perhaps be able to excuse himself by showing that the escape was the consequence of vis major or the act of God; and the principle of *Fletcher v. Rylands* (4) is accepted in Scotland: *Eastern and South African Telegraph Co. v. Cape Town Tramways Companies.* (5) *Nichols v. Marsland* (6) shows the limit of that principle, and converts the dictum of Blackburn J. into decision. There a man had constructed a number of private ponds on his

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(1) (1879) 49 L. J. (Q.B.) 851. (1868) L. R. 3 H. L. 330.

(2) (1878) 9 Ch. D. 503, 527. (5) [1902] A. C. 381, 394.

(3) (1877) 2 App. Cas. 781, 787. (6) L. R. 10 Ex. 255, 260; 2

(4) (1866) L. R. 1 Ex. 265, 279; Ex. D. 1, 4-6.

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own property; the ponds flooded and damaged his neighbour, and it was held that vis major was a good answer to an action for damages: and see *Wilson v. Waddell* (1); *Box v. Jubb* (2); *Rickards v. Lothian* (3), where *Nichols v. Marsland* (4) is approved by the Privy Council. As to the Scottish cases: in *Samuel v. Edinburgh and Glasgow Ry. Co.* (5), where the defenders had carried a burn across the railway by means of an aqueduct, Lord Cockburn stated that they were bound to provide against the ordinary operations of nature, but not against her miracles. In *Kerr v. Earl of Orkney* (6), which was a case of a reservoir, the actual decision was founded on negligence in the ordinary sense, i.e. on the absence of ordinary precautions to make the reservoir secure, but Lord Justice-Clerk Hope states the principle of liability in far more absolute terms than were subsequently adopted in *Fletcher v. Rylands* (7), and his statement of the law is inconsistent with *Nichols v. Marsland*. (4) The defender's only duty was to provide against ordinary rainfall, or at the most against such rainfall as could be reasonably anticipated: see *Potter v. Hamilton and Strathaven Ry. Co.* (8), per Lord Ardmillan, who adopts the rule laid down by Lord Cockburn. In *Pirie and Sons v. Magistrates of Aberdeen* (9) there are inconsistent dicta on the question whether an extraordinary rainfall can be regarded as a *damnum fatale*, but the majority of the judges take the test of liability to be whether the rainfall was such as could be reasonably anticipated. Applying that test to the present case, the appellants are absolved from liability. [They also referred to *Tennent v. Earl of Glasgow* (10), *Morris v. Bicket* (11), *Chalmers v. Dixon* (12), *London, Brighton and South Coast Ry. Co. v. Truman* (13), and *Hanley v. Magistrates of Edinburgh*. (14)]

Clyde, K.C. (Lord Advocate and Dean of Faculty), *Hon. W.*

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| (1) (1876) 2 App. Cas. 95. | H. L. 330. |
| (2) (1879) 4 Ex. D. 76. | (8) (1864) 3 M. 83, 86. |
| (3) [1913] A. C. 263, 279. | (9) (1871) 9 M. 412. |
| (4) L. R. 10 Ex. 255; 2 Ex. | (10) (1864) 2 M. (H.L.) 22. |
| D. 1. | (11) (1864) 2 M. 1082; (1866) 4 |
| (5) (1850) 13 D. 312, 314. | M. (H.L.) 44. |
| (6) 20 D. 298, 302-3. | (12) (1876) 3 R. 461. |
| (7) L. R. 1 Ex. 265; L. R. 3 | (13) (1885) 11 App. Cas. 45. |
| (14) 1913 S. C. (H.L.) 27. | |

Watson, K.C., and *Douglas Jamieson* (all of the Scottish Bar), were for the respondents the Caledonian Railway Company, and

H. P. Macmillan, K.C., and *Douglas Jamieson* (both of the Scottish Bar), for the respondents the Glasgow and South-Western Railway Company.

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The case for the respondents was argued by

Clyde, K.C. This case raises a question of fact. The respondents in each case have discharged the onus upon them of proving that the flooding of their property was caused by the overflow of the stream in consequence of the works executed by the appellants in the alveus of the stream. As regards the law, the English authorities appear to be based primarily upon trespass, but the Scottish judges prefer to rest themselves upon the principle of the Roman law, *Sic utere tuo ut alienum non laedas*. But all the authorities agree in this, that any one who operates in the alveus of a stream does so at his peril, and, subject to any rights he may acquire by prescription, is under a continuing liability to persons who are injured by his operations.

Constable, K.C., replied.

The House took time for consideration.

July 23. LORD FINLAY L.C. My Lords, the two actions which form the subject of these appeals were brought by the Caledonian Railway Company and by the Glasgow and South-Western Railway Company respectively against the Corporation of Greenock to recover damages for injury to the property of the railway companies by flooding said to have been occasioned by works carried out by the corporation.

The Lord Ordinary, Lord Dewar (whose loss to the Bench and country we all deplore), decided in favour of the pursuers in both cases. The case was argued on appeal before the First Division of the Inner House, and it was directed that minutes of debate should be prepared in order that the opinion of all the judges might be obtained. That opinion by a majority in each case—seven to six in the case of the Caledonian Railway Company and ten to three in the case of the Glasgow and South-Western Railway Company—was in favour of the Lord Ordinary's views, and the Inner House,

H. L. (SC.) 1917 in conformity with the opinion of the majority of consulted judges, affirmed the decision of the Lord Ordinary.

GREENOCK CORPORATION v. CALEDONIAN RAILWAY. From that decision the corporation have appealed to your Lordships' House. The result of the appeal, in my opinion, depends mainly upon questions of fact.

GREENOCK CORPORATION v. GLASGOW AND SOUTH-WESTERN RAILWAY. The case for the respondents was that the damage to the railway companies' property in Greenock was caused by a large volume of water which found its way down Inverkip Road (and its continuation, Inverkip Street) on August 5, 1912, owing to the works constructed by the corporation in and about the channel of the West Burn obstructing its flow. Inverkip Road (by which name for convenience I shall refer to Inverkip Road proper, and its continuation Inverkip Street) runs in a direction east by north through the town of Greenock, crossing on bridges first the Glasgow and South-Western Railway and, a little further down, the Caledonian Railway. The road comes down from the hills lying to the south-west of the town, and there is a considerable fall even after the road has entered the burgh, with a substantially continuous gradient, the level at the West Greenock Station of the Caledonian Railway Company being 20 feet lower than at the Lady Alice Park, alongside which the road passes soon after entering the burgh.

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The West Burn runs alongside the road above the Lady Alice Park, and brings down the drainage from an area of some 600 or 800 acres, and is liable to come down in flood in wet weather. The Lord Ordinary describes the West Burn in its natural state and as altered by the works of the corporation in the following passage of his judgment :

“ The West Burn comes from hilly ground lying to the south-west of Greenock and enters the town at the park called the ‘ Lady Alice Park,’ about 800 yards south-west of the railway station. Until a few years ago it flowed through this park for a distance of about 400 yards in a little valley. The channel of the stream was considerably below the surrounding ground which drained into it, and in particular was below the level of Inverkip Road, which lay on its north bank. In the year 1908 this little valley was presented to the town of Greenock, and the defenders, with a view to effecting a city improvement, and forming a playground for children, altered the natural channel of the West Burn and the contour of the

ground. They constructed a culvert and enclosed the West Burn in it, and raised the level by depositing material on the top of the culvert. In this way a pleasure ground has been formed, but the valley has been obliterated and the burn buried. The surface of the park now slopes down to Inverkip Road, which has become the lowest level, and is the only channel for surface water formerly drained into the West Burn, and for any overflow which may come from the burn before it reaches the mouth of the culvert. The lower end of Inverkip Road is called Inverkip Street, and leads down to Greenock West Station.

“In addition to altering the levels in this way the defenders constructed certain works at the mouth of the culvert, which had the effect of seriously obstructing the free flow of water. These works consisted of a concrete paddling pond placed near the mouth of the culvert and constructed in such a manner that the concrete bottom of the pond is 1 foot 7 inches higher than the original bed of the burn. At the bottom end there is a concrete curb or weir, and in the mouth of the culvert there is an iron grating to prevent children falling into the culvert; and in the mouth of the culvert there are a couple of large iron pipes which discharge surplus water from two of the corporation’s reservoirs. At the top end of the paddling pond there is a concrete dam placed across the stream, with a footpath on the top, to give access from Inverkip Road to Brachelston Street, and an opening underneath—8 feet wide by 4 feet 5 inches high—for the passage of the burn. The footway on the top of the dam and the cope wall of the paddling pond are both above the level of Inverkip Road.

“It is admitted that these works obstruct about half the flow of water which would otherwise go down the culvert. That is not of importance except in times of high flood. But the rainfall in Greenock is heavy, and the West Burn is frequently in high flood. It drains an area variously estimated at from 600 to 800 acres of hill ground, and running transversely across this area there are two canals or ‘cuts’ which connect some of the corporation reservoirs, and one of these cuts discharges surplus water into the West Burn. Like all hill burns it rises rapidly in heavy rain; but before the defenders altered the levels and constructed their works it had never caused any damage. Since the alterations were made, how-

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ever, it has twice overflowed on to Inverkip Road at the mouth of the culvert and damaged property in the town—once in December, 1909, and again on the present occasion.”

Before the works carried out by the corporation the West Burn had a deep and capacious channel down which all water passed freely at a level much lower than that of Inverkip Road. The works of the corporation filled up the channel altogether, in order to form the Lady Alice Park, and substituted for the channel a culvert below the surface of the park, which was raised to a height above Inverkip Road. The result was that if the culvert proved insufficient to carry off flood water it would overflow into Inverkip Road, which would be thus converted into the bed of a stream down which the water would rush in the direction of the two railways. Lady Alice Park is about 400 yards long, and at its lower end the water emerges from the culvert constructed by the corporation into the open and deep channel of the West Burn and runs down it for a distance of about 200 feet past Leslie's garage, which is on the left bank of the channel. The water is then conducted into a culvert crossing under the Glasgow and South-Western Railway and the Inverkip Road, whence it passes mainly by culverts to the sea.

On the forenoon of August 5, 1912, very heavy rain came on in the Greenock district, which resulted in the damage forming the subject of these actions. Everything turns on the sequence of events, which appears to me to have been as follows :—

10.45 the rain began ; 10.50 the rain became very heavy ; 11.15 an overflow of water coming down the West Burn took place from the paddling pond into the Inverkip Road ; 11.20 the water pouring down Inverkip Road reached Leslie's garage ; 11.40 the flood swept Leslie's garage buildings, with their contents, motors, &c., into the channel of the West Burn, and at 11.45 it swept away the wall of the Glasgow and South-Western Railway ; 12.10 the retaining wall of the Caledonian Railway Company at the West Station fell owing to the pressure of the water which had accumulated behind it.

The Lord Ordinary found that the damage was done by the water which was diverted into the Inverkip Road by the works of the corporation at Lady Alice Park. He found that the overflow from the paddling pond began at 11.15, and that this overflow, coming down the Inverkip Road, caused the fall of the Glasgow and South-

Western Railway wall at 11.45 and the fall of the Caledonian Railway Company's at 12.10. H. L. (Sc.)

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The Lord President, in an elaborate judgment, dissented from the conclusion of the Lord Ordinary in point of fact, and held that the fall of the railway walls occurred before the overflow from the paddling pond. If so, the inference is, of course, irresistible that the fall of these walls was not caused by that overflow: ante hoc ergo non propter hoc.

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The Lord President found that the retaining wall of the Caledonian Railway Company gave way about ten minutes past 12 o'clock and that the overflow of the burn and paddling pond occurred at about a quarter past 12. He referred especially to the evidence of Inglis, a witness for the pursuers (appendix, vol. 2, p. 210), and said that the Lord Ordinary failed to observe that Inglis really meant a quarter past 12 when he said that a quarter past 11 was the time when he observed the burn overflowing from the paddling pond. This witness stated in his evidence that he saw the overflow at 11.15 from the higher ground in a market garden situate at the corner formed by the junction of Bow Road and Inverkip Road, just opposite the paddling pond. When the rain came on he took shelter in a greenhouse for a time, and went up to the higher ground in the market garden after the rain had been falling for about half an hour. As the rain began at 10.45 or thereabouts this points to about 11.15 as the time when Inglis went up to the higher ground in the garden, and 11.15 is the time he specifies in his evidence. The passage to which the Lord President refers (appendix, vol. 2, p. 131) as showing that Inglis meant 12.15 when he said 11.15 appears to me clearly to relate to a subsequent occasion altogether when he left the market garden "at the back of twelve," crossed the Bow Road, and went up through the cemetery and then down through its main gate. Taking Inglis's evidence as a whole, I have no hesitation in accepting the Lord Ordinary's understanding of his evidence as correct. Inglis's evidence, so understood, is consistent with the effect of other evidence in the case as a whole, and is particularly corroborated by the witnesses Smillie and Sheridan.

When the pond overflowed the flood rushed down Inverkip Road and reached Leslie's garage, pouring into the yard through

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the upper gateway. The men who were there described the exertions which they made to stem the flood, exertions which would probably fill up some fifteen or twenty minutes of time and bring us up to 11.40 or thereabouts—the probable time of the fall of the garage. This time is arrived at by the fact that the Glasgow and South-Western signalman, Robert Handley, fixes 11.50 as the time when he saw the flood and debris pouring along the line of the Glasgow and South-Western Railway, which they had reached through the breach in the railway wall. Reckoning back from 11.50, the hour fixed by the signalman, it appears to be probable that the Lord Ordinary was right in saying that the overflow from the pond converting the Inverkip Road into a torrent took place at about 11.15.

The evidence, taken as a whole, seems to point to this conclusion, and the opinion of the judge who heard and saw the witnesses is, of course, entitled to great weight on a point of this kind.

The evidence appears to leave no doubt that the flood coming down the road from the overflow of the pond was the cause of the damage to the Glasgow and South-Western Railway Company. The great volume of water which found its way into the yard of the garage at and after 11.20 cannot well have come from any other source. At about 11.40 it swept the garage buildings and their contents, including two motors, into the bed of the stream, and the flood impelled this mass of solid material against the railway wall, which collapsed.

As regards the damage done to the wall of the Caledonian Railway Company, which is situate further down the Inverkip Road, it was strongly contended for the corporation that after the collapse of the garage buildings at 11.40 the flood proceeding from the overflow at the paddling pond would rush through the garage yard into the bed of the stream and, when the wall fell, down the line of the Glasgow and South-Western Railway, so that any contribution from the West Burn to the fall of the Caledonian Railway wall would from that time have been impossible. I do not think that this is correct in point of fact. Though the gate at the upper end of the garage yard was open, the fence remained between the yard and the road, and the lower gate was closed. This would be quite enough to ensure that a great part of the flood would continue in

its course down the Inverkip Road and would not be diverted into the garage yard.

The West Greenock Station of the Caledonian Railway Company is situate in the angle formed by the junction of Roxburgh Street with Inverkip Road, and at the junction there is an open space spoken of in the evidence as the Railway Square. Very soon after the rain-fall began water began to gather in this square, pouring into it from the adjacent streets, and began to accumulate behind a retaining wall of the railway company forming part of the station buildings. This wall ultimately collapsed, owing to the pressure of the water upon it, and the action is brought by the Caledonian Railway Company on the allegation that its fall was caused or materially contributed to by the flood from the West Burn, which, after the overflow from the paddling pond, found its way down Inverkip Road into the square, and thence upon the railway premises. It was contended by the corporation that the damage to this wall was done entirely by water from other sources and that their works were in no way responsible for what happened.

I agree with the Lord Ordinary in thinking that in point of fact the flood coming down Inverkip Road caused by the diversion into this road of the water, which, but for the corporation's works, would have found its way to the sea by the open channel, substantially contributed to the disaster. As soon as it is established that the overflow from the paddling pond preceded the fall of the retaining wall by nearly an hour, it is almost impossible to suppose that the great volume of water which from this source would find its way into the square both before and after the fall of the garage would not contribute substantially to what followed. It would require a very clear case upon the evidence to justify a reversal of the finding of fact by the Lord Ordinary, before whom the case was tried, and in my opinion the effect of the evidence as a whole is to show that the Lord Ordinary was right. The evidence shows that there had been a considerable gathering of water in the square adjoining the West Station before the overflow from the West Burn at the paddling pond. Dr. Cook, a witness called by the appellants, who passed in his car along Roxburgh Street from the east, across the Railway Square and across Brachelston Square and up South Street, describes the flooded condition of the Railway Square

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and the west part of Roxburgh Street, and says that the water was coming down Mount Pleasant Street, Caddlehill Street, and South Street. He adds: "At the time I crossed Brachelston Square there was practically no water coming over from Inverkip Road. That must have been half an hour after the onset of the flood. That would be half past 11. . . . I may be five minutes out in my time, but not more; I am quite sure of that. I should think it would be from thirty to thirty-five minutes after the heavy rain came on, whatever time that was."

If the commencement of the heavy rain is taken as being at 10.50 this would bring the time spoken of by Dr. Cook to 11.20 or 11.25.

Hector Crawford, another witness called by the corporation, was in the employment of Messrs. McPherson & Co., slaters, 80, Roxburgh Street. Between 11 and 12 on August 5 he was called by telephone to a house in South Street. He describes the flood in the Railway Square and the streets through which he passed:—
 "Q. What was the state of Inverkip Road when you first looked up it?—A. When we got to the West Station and looked up there was no water coming down Inverkip Road. Q. Was water coming down the other streets at that time when you saw none coming down Inverkip Road?—A. Yes." . . . "I then suddenly saw water coming down Inverkip Road with great force. It looked as if there was a sudden stream beginning to pour down Inverkip Road."

David White Mill, another witness called by the corporation, gave evidence to the same effect. He said: "I should say that it would be half an hour after the heavy rain came on that I first noticed that water was coming from the Inverkip direction. . . . The square was flooded before I saw any water coming from the Inverkip direction. I should say from what I noticed that the burn water came in about half an hour after the square started pounding up, and I should say the square was flooded about twenty minutes before I noticed the water coming in from the Inverkip direction. . . . None of the other streets made as heavy a discharge of water into the square as Inverkip Street, although Mount Pleasant Street was very heavy."

All this evidence goes to show that the greatest volume of water

which came down to the Caledonian Railway Square was from the Inverkip Road, and that it started coming down from that direction with suddenness at some time between 11 and 12. It appears to me that the reasonable inference is that this flood coming down the Inverkip Road proceeded from the overflow of the burn from the paddling pond, caused by the corporation's works there. When once it is established that this very considerable volume of water came down the Inverkip Road, beginning at 11.15, it appears to me only reasonable to conclude that it substantially contributed to the pressure of the water upon the retaining wall of the Caledonian Railway Company and its consequent collapse, and it appears to me to have been the main, if not the only, cause of the fall of the garage and the consequent destruction of the wall of the Glasgow and South-Western Railway.

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It remains to consider the questions of law raised on behalf of the appellants.

The question of the liability incurred by any person who interferes with a natural watercourse was considered in the Court of Session in the case of *Kerr v. Earl of Orkney*. (1) In that case a dam had been constructed on a stream for the purpose of collecting water, and Lord Justice-Clerk Hope makes the following observations as to the extent of the liability for damage occasioned by the escape of such water :

“ Although we did not require any answer from the respondent upon the general point of Lord Orkney's liability for the consequences of his dam bursting from a violent fall of rain, yet I think it right to state the general principle on which the view of the Court is founded. That principle is—that if a person chooses upon a stream to make a great operation for collecting and damming up the water for whatever purpose, he is bound, as the necessary condition of such an operation, to accomplish his object in such a way as to protect all persons lower down the stream from all danger : He must secure them against danger. It is not sufficient that he took all the pains which were thought at the time necessary and sufficient. They were exposed to no danger before the operation. He creates the danger, and he must secure them against danger, so as to make them as safe notwithstanding his dam as they were

(1) 20 D. 298, 302.

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before. It is no defence in such a case to allege the dam would have stood against all ordinary rains—it gave way in an extraordinary and unprecedented fall of rain, which could not be expected. The dam must be made perfect against all extraordinary falls of rain—else the protection is not afforded against the operation which the party must accomplish. An extraordinary fall of rain is a matter which, in our climate, cannot be called a *damnum fatale*—supposing the doctrine so denoted by that term to be applicable, generally speaking, to a dam for collecting water. And the experience of the last fifteen years has shown that the increased drainage of the country brings down in heavy rains the whole water in a very short space of time, and therefore in floods of a weight, and power, and force of water quite unknown in former times. But against such a state of things the party forming such dams must completely provide, so as to secure safety to those lower down the stream. When an operation is made which involves great risk to the safety of life and property, the condition on which alone that can be allowed which causes such risk is complete protection. A dam that gives way in a night's rain is not such as the maker was bound to erect. The fact that it gives way is a proof that his obligation was not fulfilled, and that the protection was not afforded which he was bound to provide.

“What shall be considered a *damnum fatale* in such a case I need not inquire, but of this I am very clear, that a great fall of rain and consequent accumulation and weight of water is not a *damnum fatale* which exempts the proprietor from liability for the failure of his operation—for it is against such accumulation and weight of water that he is bound to provide.”

In my opinion the Lord Justice-Clerk in that passage correctly stated the law of Scotland, and it received approval in your Lordships' House when the *Earl of Orkney's Case* (1) came under consideration in *Tennent v. Earl of Glasgow*. (2) In that case the defender had substituted a wall for a hedge as a defence for his property. A stream burst its banks at a point above the wall, and the water descending was dammed up by the wall, which after a time gave way and considerable damage was done by the accumulated water to the lands of an inferior inheritor. In giving judgment

(1) 20 D. 298.

(2) 2 M. (H.L.) 22, 26, 28.

Lord Westbury says: "My Lords, this case differs very much from those which have been cited and relied upon at the Bar. If anything be done by an individual which interferes with natural occurrences, such as, for example, in *Lord Orkney's Case* (1), throwing a dam across the course of a stream, it is undoubtedly the duty of that individual so to construct the work as to provide in an efficient manner, not only against usual occurrences and ordinary state of things, but also to provide against things which are unusual and extraordinary. And, therefore, the decision of the Court in the *Earl of Orkney's Case* (1), where a dam gave way, was properly referable to that circumstance." Lord Chelmsford says: "This case is not at all like the case of *Lord Orkney* (1)—that is, the case with respect to the dam, because there, as I have already intimated, the stream before the erection of the dam flowed harmlessly to the pursuer's mill. Lord Orkney erected a dam, by which he obstructed and headed up the course of the water. He was bound, therefore, under those circumstances,—interfering with the stream, and with another person's right over the stream,—to provide against every contingency. And although it was an extraordinary flood in that case which occasioned the bursting of the dam, it was one which he ought to have provided against. He ought to have made the dam capable of resisting any force which might be directed against it."

These authorities justify the view of the law propounded by Professor Rankine in his work on the Law of Land Ownership in Scotland, 4th ed., p. 376: "The sound view seems to be that even in the case of an unprecedented disaster the person who constructs an opus manufactum on the course of a stream or diverts its flow will be liable in damages provided the injured proprietor can show (1.) that the opus has not been fortified by prescription, and (2.) that but for it the phenomena would have passed him scathless." This passage, in my opinion, expresses the true view of the law applicable to this case.

The appellants contend that they are not responsible, as the injury to the wall was in the nature of *damnum fatale*. What amounts to *damnum fatale*? Its definition is given by Lord Westbury in *Tennent v. Earl of Glasgow* (2): "Under these circumstances, my Lords, what has occurred is one of those things

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which do not involve any legal liability—what are denominated in the law of Scotland *damnum fatale* occurrences—circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which when they do occur, therefore, are calamities which do not involve the obligation of paying for the consequences that may result from them.”

Lord Cockburn expressed the same idea in a picturesque phrase used by him in *Samuel v. Edinburgh and Glasgow Co. Ry.* (1) when he said: “I think he is bound to provide against the ordinary operations of nature, but not against her miracles.”

In my opinion the appellants have entirely failed to establish any defence on this ground. It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of *damnum fatale*, but is the direct result of the obstruction of a natural watercourse by the defenders’ works followed by heavy rain.

Reliance was placed by the appellants upon the case of *Nichols v. Marsland*. (2) In that case it was decided that if the escape of water from a reservoir was due to the act of God, the person maintaining the reservoir is not liable. As Mellish L.J. put it: “If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands v. Fletcher* (3) establishes that he must be held liable.” The Lord Justice then goes on to decide that if the bursting of the reservoir was due to the act of God the liability to pay damages does not arise.

Nichols v. Marsland (2) had been tried by a jury, and the finding

(1) 13 D. 312, 314.

(2) L. R. 10 Ex. 255; 2 Ex. D. 1, 5.

(3) L. R. 3 H. L. 330.

of the jury is thus stated by Mellish L.J. : " The remaining question is, did the defendant make out that the escape of the water was owing to the act of God ? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented ; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault ; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate."

Two observations arise upon this case of *Nichols v. Marsland*. (1)

The first is that the case is dealt with in the argument and judgments with reference merely to the accumulation of water in a reservoir. There is no reference to the fact that the course of a natural stream had been interfered with. The operations which had in fact been carried out are described on p. 256 of the report of the case in L. R. 10 Ex. as follows : " A natural stream called Bagbrook, which rose in higher lands, ran through the defendant's grounds, and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by an artificial embankment into a pool of three acres in area, called ' the upper pool,' from which it escaped over a weir in the embankment, and was again similarly dammed up by an artificial embankment into the ' middle pool,' which was between one and two acres in area. Escaping over a weir in the embankment, it was again dammed up into the ' lower pool,' which was between eight and nine acres in area, and from which the stream escaped into its natural and original course." This decision, having reference merely to the storage of water as in *Rylands v. Fletcher* (2), does not affect the question of liability for interference with the course of a natural stream as laid down in the authorities cited above.

Secondly, the jury had found that the damage was occasioned

(1) L. R. 10 Ex. 255 ; 2 Ex. D. 1.

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by the act of God, and on p. 6 of the report in 2 Ex. D. there is this note: "The question whether the rule should be made absolute for a new trial, on the ground that the verdict was against the evidence, was reserved for future discussion, if the plaintiff should desire it."

It does not appear that this question was ever again brought up for discussion in the Exchequer Chamber.

In the case now under appeal the Lord Ordinary found, and in my opinion rightly found, that the flood could not be regarded as in the nature of *damnum fatale*, and that the appellants in constructing the culvert ought to have foreseen the possibility of such an occurrence and to have provided against it. In my opinion both the appeals fail upon all points, and should be dismissed with costs.

LORD DUNEDIN. My Lords, I concur. The Lord Chancellor has gone so fully into the evidence, and I am so entirely in accordance with the view he has taken of the events of the morning of August 5, 1912, that I cannot think of inflicting on your Lordships what would only be a repetition of what he has said. I agree with the Lord Ordinary and disagree with the Lord President as to the time at which the overflow at the pond took place. The view of the Lord President is, I think, based on what I conceive to be an erroneous impression—that Inglis went only once up the hill. Further, it does not square with the times of the various occurrences. That the fall of the Glasgow and South-Western wall was occasioned by the descent upon it of the wreckage of the garage seems to me certain, the evidence being the character of the debris which was carried down the tunnel towards Prince's Pier. That the wrecking of the garage was due in its turn to the overflow from the pond is made out, in my opinion, first, because of the synchronization of the various time observations, and, second, because without some sudden and great access of pressure I do not think the garage would have been wrecked; and such sudden and great access is easily attributable to a great overflow which, it is admitted, did at some time *de facto* take place. Moreover, once we find that the overflow sent a great additional body of water down the hill, it becomes evident that that water would maintain at a pressure level the

water which had lodged behind the Caledonian Company's retaining wall, and which but for this maintenance might have cleared itself through the weepholes.

As to the appellants being in fact responsible for the alteration of the bed of the stream, which made what happened possible, there is no dispute. The only question that remains is whether the responsibility in fact entails a responsibility in law.

My Lords, I think I am making an accurate statement when I say that the case of *Kerr v. Earl of Orkney* (1) has been since its date considered by Scottish lawyers to have been well decided, and it will from henceforth enjoy the approval of the noble Lord on the woolsack, and I believe of the other noble Lords who have taken part in this appeal. Mr. Constable in his address, which was equally admirable for its force and its moderation, felt that he was pressed by that case, and argued that, though the decision itself was right, the dicta in it must be regarded as modified by what had since been decided, and notably by the cases of *Nichols v. Marsland* (2) and *Fletcher v. Smith*. (3)

Nichols v. Marsland (2) was, as his Lordship has pointed out, decided upon the footing of the verdict of the jury, which, as construed by the Court, amounted to a direct finding that the occurrence in question was an act of God, which is the exact equivalent to the expression used in the Scotch cases *damnum fatale*. Lord Justice-Clerk Hope, in *Kerr v. Earl of Orkney* (1), expressly saved the case of *damnum fatale*, adding that whatever might be a *damnum fatale*, an extraordinary fall of rain in the climate of Scotland could not be so considered. But, further, what I think makes it clear that the doctrine of act of God or *damnum fatale*, which was what was given effect to in *Nichols v. Marsland* (2), did not in any way weaken the authority of *Kerr v. Earl of Orkney* (1) is the way in which that case was considered and treated in a subsequent case in your Lordships' House, namely, *Tennent v. Earl of Glasgow*. (4) In that case the Earl of Glasgow had built a wall along a road where a hedge had been. There was a burn which ran parallel to the road at a distance of about a quarter of a mile. The burn eventually entered beneath the road by a conduit, and an opening had been

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(1) 20 D. 298.

(3) 2 App. Cas. 781.

(2) L. R. 10 Ex. 255; 2 Ex. D. 1.

(4) 2 M. (H.L.) 22, 25, 26, 27.

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made in the wall to allow of the burn entering the conduit. There was an extraordinary fall of rain, and the burn burst its banks at a place where there was a bend, invaded the road at a place far above the entrance of the conduit, and formed an accumulation behind the wall, through which it eventually burst and caused the damage complained of. Lord Westbury L.C. said: "If anything be done by an individual which interferes with natural occurrences, such as, for example, in *Lord Orkney's Case* (1), throwing a dam across the course of a stream, it is undoubtedly the duty of that individual so to construct the work as to provide in an efficient manner, not only against usual occurrences and ordinary state of things, but also to provide against things which are unusual and extraordinary. And, therefore, the decision of the Court in the *Earl of Orkney's Case* (1), where a dam gave way, was properly referable to that circumstance. . . . But there was nothing which the noble defender was bound to guard against in the building of a wall along the public road . . . nor was the wall erected for the purpose of interfering with anything like that which has been called at the Bar the course of nature. . . . Under these circumstances, my Lords, what has occurred is one of those things which do not involve any legal liability—what are denominated in the law of Scotland *damnum fatale* occurrences—circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that may result from them." And in an earlier part of his judgment he had said: "It might have been a very material thing in this case, if the injury, or the wrong as I should rather call it, sustained by the appellant could have been shewn to be caused by a state of circumstances directly occasioned by the building of the wall by the noble defender over the conduit, and along the parish road, because it is clear that the natural course of the stream was down the parish road, and that the conduit provided a means of carrying the water beneath the parish road."

My Lords, it is clear that a case decided by the Inner House of the Court of Session, and afterwards approved by your Lordships' House in another Scotch case, cannot as authority be overruled

or modified by a decision of the English Exchequer Chamber. H. L. (Sc.)
 But the truth is that, once it is recognized that *Nichols v. Mars-*
land (1) proceeded on the verdict of the jury, there is no incon-

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As regards the case of *Fletcher v. Smith* (3), there was again a finding of the jury that precludes any effect of it as a decision against the case of *Kerr* (2), for the jury found that the substituted watercourse was not as efficient as the old. The appellants, however, pinned their faith to the preference expressed by Lord Penzance (though he expressly declined to give a positive opinion on the matter) for the second as opposed to the third of the questions he put. These questions were : " Secondly, were they (the defendants) bound (as they, for their own convenience, were making a new and artificial watercourse) to construct it in such a manner that it would be capable of conveying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality ? Or, thirdly, were they bound to make provisions for any such quantities of water as might possibly be discharged into it from any mere rainfall, however heavy, however unusual, and however contrary to all previous experience ? " Now, the second proposition, as contrasted with the first, is really of no assistance to the appellants unless it is possible to extract from the phrases used a definition of what is and what is not a *damnum fatale*. The appellants argue that, applying Lord Penzance's test, if they can show that this rainfall was much in excess of what had been previously observed in Greenock that is enough. I do not think that you can rightly confine your view to Greenock alone. No one can say that such rainfall was unprecedented in Scotland ; and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to. With deference to Lord Penzance, I think that there is no clear-cut choice in law between his two propositions, but that it always comes to a question of fact whether such and such an occurrence was a *damnum fatale* ; and I hold a clear opinion that this flood was not.

I agree with the Lord Chancellor that the law is accurately stated

(1) L. R. 10 Ex. 255 ; 2 Ex. D. 1.

(2) 20 D. 298.

(3) 2 App. Cas. 781, 787.

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by Professor Rankine in his book. I may perhaps add that the expression "fortified by prescription" does not, I think, mean that the work is protected by the actual prescription statutes, but that by analogy (as such analogy has been applied in the case of servitudes) the existence of a state of things for the period of the long prescription may serve to prevent any person alleging that another state of things was the true state of nature.

The appeals, in my judgment, should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, I concur.

The case, on the facts, is, so far as the operations of the corporation were concerned, of a simple character. That body made an operation in the alveus of a natural stream. This stream, added to in volume here and there by little tributaries, was wont to flow to the sea in a wide natural channel. It is admitted that on the occasion of the heavy rainstorm in question, apart from the check, accumulation, and distortion caused by the appellants' operations, the natural channel would have accommodated the rainstorm and passed its waters safely to the sea.

This natural state of matters was interfered with by the formation of a pond or dam, so constructed as, of course, to raise the stream level. The operation, however, was such that when the overflow from the spate in question occurred, that overflow—thus gathered and otherwise insufficiently provided for—was sluiced in great and damaging volume down one of the public roads of Greenock. The result accordingly is that this operation, initially an operation in alveo, was so conducted that a fresh escapement and alveus had to be found by the water. It seems somewhat elementary to declare that an operation thus resulting in the creation of a new and devastating and unnatural alveus for a natural and otherwise safely flowing stream must carry with it the responsibility for the damage so caused.

In the view taken by that very careful and sagacious judge Lord Dewar (Lord Ordinary) there is no refinement of fact about the case; it is as broad as has been stated. He says: "I think it is out of the question for them (the corporation) to argue that they were entitled to bury the burn, which from time immemorial had carried flood waters safely to the sea, and to alter the levels so that

the public highway, leading on a descending gradient into the town, became the only means by which these flood waters could escape."

As to whether this was the actual state of the facts, I express my opinion in the affirmative. I agree with the analysis of, and conclusions upon, the evidence made by the learned Lord Ordinary and by my noble and learned friend on the woolsack. May I add that I humbly think that some of the doubts and difficulties on fact, in the judgments of the learned minority in the Court below, have arisen from a misapprehension as to the time when the overflow from the pond took place. I refer in particular to the judgment of the learned Lord President, who holds "that the overflowing of the burn at the paddling pond occurred about a quarter past 12 o'clock." This view was not strongly defended in argument; it, I think, erroneously postpones the occurrence by at least three-quarters of an hour; and this error dislocates the entire sequence of, and causal relation between, the events in the case. There is, in short, nothing to induce me to question or to differ from the learned judge of first instance as to fact.

This being as stated, the law of the case appears to be in no way doubtful. My Lords, I have never known the law of Scotland as stated in the judgment of the Lord Justice-Clerk Hope in the *Earl of Orkney's Case* (1) to be questioned. On the contrary, it has been, since its date, accepted as sound. And I think it right to add, being in this fortified by the opinion of the noble and learned Lord Chancellor, that I know of no decided authority for the proposition that there is any difference on this topic between the law of England and that of Scotland.

A person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level as secure against injury as they would have been had nature not been interfered with. And this is so although the water accumulated suddenly, or the fall was extraordinary or even unprecedented in quantity. These are the general propositions of the law. While, if any help as to Scotch climatic conditions might be sought, one would get that also from the observation made by Lord Justice-Clerk Hope—and, by the way, plainly

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H. L. (Sc.) applicable in the present case : “ An extraordinary fall of rain
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 GREENOCK doctrine so denoted by that term to be applicable, generally speak-
 CORPORATION ing, to a dam for collecting water.”

CALEDONIAN No doubt whatsoever is thrown upon these doctrines by *Nichols*
 RAILWAY. v. *Marsland*. (1) A perusal of the judgments and procedure therein
 GREENOCK shows that it was held by a jury's finding that the disaster did
 CORPORATION as a matter of fact occur by a *damnum fatale*. I cannot, I confess,
 v. view the case as wholly satisfactory ; but its conclusion was reached
 GLASGOW undoubtedly and solely by the road of settled fact—an affirmation
 AND of *damnum fatale*.
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Such an affirmation has not been made in the present case, and in my opinion, on its merits as well as on the guide to a proper view thereof as expressed in the outstanding authority of *Kerr v. Earl of Orkney* (2), which I have cited, such an affirmation could not be made. These occurrences arose from a heavy, it may be an extraordinary and it may be an unprecedented, spate. That spate would have harmlessly passed away but for the appellants' operations. These operations, however, converted them into sources of harm and damage, and the appellants are thus answerable therefor.

In the words of Lord Chelmsford in *Tennent* (3)—a case which in substance entirely approved of the principle of *Kerr v. Earl of Orkney* (2)—“ He was bound, therefore, under those circumstances,—interfering with the stream, and with another person's right over the stream,—to provide against every contingency. And although it was an extraordinary flood in that case which occasioned the bursting of the dam, it was one which he ought to have provided against.”

It is accordingly quite unnecessary to go into the doctrine of *damnum fatale* in general. I am not entirely satisfied that that expression or the equivalent expression, “ the act of God,” will ever be capable of complete, exact, and unassailable definition. The nearest approach which the law has made to that point is in the judgment of Lord Westbury L.C. in *Tennent*. (4) Further, I may be allowed to express the doubt whether expressions such as those

(1) L. R. 10 Ex. 255 ; 2 Ex. D. 1.

(2) 20 D. 298.

(3) 2 M. (H.L.) 22, 28.

(4) 2 M. (H.L.) 22.

used by Lord Cockburn in *Samuel v. Edinburgh and Glasgow Ry. Co.* (1) as to nature's "miracles" do anything to clarify, or indeed whether they do not confuse, the issue. And I am quite clear that when in *Potter v. Hamilton and Strathaven* (2) Lord Ardmillan supplemented his citation from Lord Westbury's judgment in *Tennent's Case* (3) by the observation "A party who makes a new work is bound to protect those on a lower level from extraordinary as well as ordinary accumulations of water, provided they be not such as to amount to an unprecedented event, so improbable and unnatural as could not have been reasonably anticipated," such a gloss is not warranted by law. Its effect might be to whittle away and undermine an affirmation of the law which, without it, would be, as it was meant to be and is, broad and firm.

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LORD PARKER OF WADDINGTON. (4) My Lords, I agree.

With regard to the facts, I cannot find any valid reason for dissenting from the findings of the Lord Ordinary, and *Kerr v. Earl of Orkney* (5) (approved by this House in *Tennent v. Earl of Glasgow* (6)) is undoubtedly the governing authority. I do not understand that the Lord Justice-Clerk in the former case intended to decide that the Scottish doctrine of *damnum fatale* could never have any application in cases such as that with which he was dealing, but merely that the facts before him disclosed no such *damnum*. If this be so, *Kerr v. Earl of Orkney* (5) is not in conflict with the English authorities. *Rylands v. Fletcher* (7) saved the question whether the act of God might not have afforded a defence, and this question was answered in the affirmative in *Nichols v. Marsland* (8), in which the act of God had been established by the finding of the jury, though I have some doubt whether that finding was correct. With regard to *Fletcher v. Smith* (9), it decides nothing, but I think the House was inclined to accept the view of the law which had been taken in *Nichols v. Marsland* (8), though it is true that Lord Penzance's alternatives are not very clearly stated.

(1) 13 D. 312, 314.

(2) 3 M. 83, 86.

(3) 2 M. (H.L.) 22.

(4) Read by Lord Shaw of
Dunfermline.

(5) 20 D. 298.

(6) 2 M. (H.L.) 22, 28.

(7) L. R. 3 H. L. 330.

(8) L. R. 10 Ex. 255; 2 Ex.
D. 1.

(9) 2 App. Cas. 781.

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 ———

LORD WRENBURY. My Lords, a question much debated at your Lordships' Bar has been as to the exact time at which the flood water caused the paddling pond to overflow. For the decision of this case I do not find it necessary to arrive at any concluded opinion upon this question, and that for the following reasons :

The result of the works which the appellants constructed at the Lady Alice Park was that throughout the area of the land of the corporation the floor of the valley was raised by filling up the V-shaped hollow of the valley to a horizontal level which was approximately the level of the Inverkip Road, and that there was inserted in the soil the culvert through which the water of the drainage area was thereafter to be conducted. Upon plan 18 are sections C.S. 6 to C.S. 10, which show (*a*) the sectional area of the valley below a horizontal plane coinciding approximately with the plane of the level of the Inverkip Road as the valley existed before the corporation's works were constructed, and (*b*) the sectional area of the culvert. The sectional area of the former is of course many times that of the latter. The volume of flood water that the former could carry was therefore many times that which the latter could carry. And there has further to be considered the additional friction due to liquid flow in a culvert as distinguished from liquid flow in an open valley. The evidence is that the minimum sectional area of the valley below the horizontal level of the Inverkip Road would have carried 2500 cubic feet per second, an amount nearly five times as much as was here in question.

The natural alveus of the stream (had it remained unaltered) would therefore have sufficed to take, not only that which was flowing down the burn and reaching the paddling pond, but all the water coming from the westward down the Inverkip Road, swollen as it was by water coming down what I may call tributary roads into the Inverkip Road. Some of this, no doubt—say a few inches in depth—might have followed the line of the Inverkip Road alongside of the burn. But all of it could have been, and the great bulk of it would have been, received by the lower lying alveus of the burn. These propositions are as true of the time before the paddling pond overflowed as after that time. The only difference before and after that happened was that at the moment when the pond overflowed

the fact was that the volume of water which, as between the burn and the road, came down the former, as distinguished from the latter, proved to be in excess of the capacity of the culvert whether it was at that time freely open or partially choked with debris. But the corporation were responsible for all the water which, but for their works, would have found a free vent down the alveus of the stream, and of this the paddling pond water was but part.

The evidence nowhere discloses that at the time, whatever it was, at which the pond overflowed any one detected a greater volume of flood. It was greater no doubt, but upon the evidence the ravages of the flood are attributable not to this overflow water as distinguished from other water, such as the volume of water coming from the west, as to which Mr. Peile speaks, but to all the mass of water of which this overflow water formed some but not a principal part.

My Lords, the other matter upon which I will add a word is as to the law. Numerous cases have been cited, beginning in England with *Rylands v. Fletcher* (1), and in Scotland with *Samuel v. Edinburgh and Glasgow Ry. Co.* (2) and *Kerr v. Earl of Orkney*. (3) But in none of these was the question one as to liability for the consequences resulting from works in alveo fluminis whereby the natural alveus was filled up and the flow of water under the force of gravity thrown into a new channel at a new and higher level. The effect of the corporation's works was that, except in so far as their culvert sufficed to take and took water coming from the westward, the Inverkip Road was substituted for the V of the valley, and became the channel by which all that water had to be drained away. In such a case the corporation is responsible, I conceive, for resultant damage howsoever arising. The responsibility to provide a substituted channel is not limited to providing a channel sufficient to meet all demands which might reasonably be anticipated, or even all demands (in excess of the ordinary) short of the act of God. The corporation must provide a substituted channel which will be equally efficient happen what will. Assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results

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(1) L. R. 3 H. L. 330.

(2) 13 D. 312.

(3) 20 D. 298.

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not from the act of God, but from the act of man in that he failed to provide (as there was before) a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God.

The case is not that of a man who has brought a wild beast upon his land and has effectually chained it and the chain has been broken by the act of God. That was *Nichols v. Marsland*. (1) It is a case in which the act of God (if there was one) brought the wild beast, and (but for the act of man) there was a safe exit for the wild beast and it would have gone away and there would have been no injury. The act of man consisted in closing the exit, which had it remained would have rendered the advent of the wild beast harmless. To construct a reservoir on your own land is a lawful act. To close or divert the natural line of flow so as to render it less efficient is not. It has never been held that in such a case there is not liability.

My Lords, upon the facts in the *Glasgow and South-Western Case* I do not add anything. I am satisfied that, whether their wall fell before or after the overflow of the pond, the damage resulted from the fact that the corporation had made the Inverkip Road a sort of substituted *alveus fluminis*, and that the wreckage of the garage, the consequent blocking of the Glasgow and South-Western culvert, and the resultant fall of the wall are due to that state of things.

Upon the *Caledonian Case* I have felt much more difficulty. When the Glasgow and South-Western wall fell at 11.40 or 11.45 there was opened to the flood a new channel of ample capacity and at a much lower level, namely, the Glasgow and South-Western tunnel down to the Prince's Pier. There was, I think, upon the evidence, very considerable means of access from the Inverkip Road to that new channel. The respondents have an arduous task to maintain that the fall of the Caledonian wall some half-hour later, at 12.10, was due to water coming from the westward down the Inverkip Road and not to flood water, of which there was plenty reaching the station square from other directions. But as your Lordships are satisfied that the evidence is sufficient to support

(1) L. R. 10 Ex. 255 ; 2 Ex. D. 1.

the *Caledonian Case*, I do not take it upon myself to differ from your Lordships' conclusion in that case.

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*Interlocutors of the First Division of the Court of
Session in Scotland affirmed and appeals dismissed
with costs.*

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Lords' Journals, July 23, 1917.

Agents for appellants: *John Kennedy, W.S., for Cumming & Duff, W.S., Edinburgh.*

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Agents for respondents the Caledonian Railway Company: *Grahames & Co., for D. L. Forgan, Glasgow, and Hope, Todd & Kirk, W.S., Edinburgh.*

Agents for respondents the Glasgow and South Western Railway Company: *Sherwood & Co., for Maclay, Murray & Spens, Glasgow, and John C. Brodie & Sons, W.S., Edinburgh.*

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July 3.

[PRIVY COUNCIL.]

THE PRINZ ADALBERT.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Goods—Neutral Claimant—Transfer to Enemy after Seizure—Bill of Lading against Acceptance—Intention—Purchaser or Agent for Sale.

A claimant to goods seized as prize must prove his right thereto at the date when he comes before the Court as owner; it is not sufficient that he was owner at the date of the seizure.

When shippers of goods discount a draft upon the consignee and authorize the discounters to hand to him a bill of lading, to the order of, and indorsed by, the shippers, upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the ownership of the goods is to pass to the consignee when he accepts the draft. That inference may be modified, or rebutted, by particular arrangements between the shippers and the consignee, and is subject to the rules which arise out of a state of war existing, or imminent at the beginning of the transaction. The transfer of the property upon the acceptance of the draft is consistent with the consignee being either a purchaser from the shippers or their agent for the sale of the goods.

APPEAL from a decree of the President of the Admiralty Division, in Prize, dated April 6, 1916.

The appeal was by neutral shippers, carrying on business at Philadelphia, U.S.A., against the condemnation of two parcels of lubricating oil, consisting of 290 and 86 barrels respectively, consigned by the appellants in the German steamship *Prinz Adalbert* to a German company at Hamburg, and seized at Falmouth on August 5, 1914.

The facts are stated in the judgment of their Lordships.

The appellants produced a copy of the invoice for 290 barrels, which referred to them as consigned "for sale" by the German company "with returns to" the appellants, and a copy of invoices for the 86 barrels, referring to them as "sold f.o.b. ex steamship *Hamburg*."

The President (Sir Samuel Evans) held that the property in both parcels passed to the German company upon shipment.

**Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

1917. May 21. *Roche, K.C.*, and *C. R. Dunlop*, for the appellants. (1) The documents already produced are more consistent with the German company being agents for sale than with their being purchasers. The manner in which the proceeds were dealt with in the accounts indicates that the former was the true relationship: *Ireland v. Livingston*. (2) In either case, however, the handing over of the bills of lading against the acceptances shows that the intention was that the property should not pass until the drafts were accepted: Sale of Goods Act, 1893, s. 19; *Shepherd v. Harrison*. (3) The quarterly account shows that the acceptance in respect of the 290 barrels was not made until August 10, 1914—namely, after the seizure. The date of seizure is the critical date; it is not material if the property subsequently passed to the German company. In the case of the 86 barrels the accounts show that the acceptance was on August 1, but, having regard to the terms of the consignment of that parcel, the property was not intended to pass until delivery was made into another ship at Hamburg.

Sir Frederick Smith, A.-G., and *Rayner Goddard*, for the Procurator-General. The true inference is that both drafts were accepted on August 1, and that the property then passed. If, however, that for the 290 barrels was accepted on August 10, the appellants were not owners when the writ was issued, nor when they put forward their claim. [*The Schlesien* (4) was referred to.]

C. R. Dunlop in reply. Goods which at the time of their seizure are the property of a neutral, and are not contraband, are not liable to condemnation even if the ownership has since passed to enemies. *The Schlesien* (5) is distinguishable. In that case Austrian goods were seized before war was declared with Austria; the owner became an enemy upon that declaration, and moreover a new writ was issued.

(1) The appellants also petitioned for leave to adduce as further evidence an agreement between themselves and the German company under which they alleged that the business was carried on. Their Lordships re-

jected this petition, the appellants having had ample time to place their evidence before the Prize Court.

(2) (1872) L. R. 5 H. L. 395.

(3) (1871) L. R. 5 H. L. 116.

(4) [1916] P. 225.

(5) (1916) 2 Bro. & Col. P. C. 268.

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J. C. July 3. The judgment of their Lordships was delivered by
1917 LORD SUMNER. When the German steamship *Prinz Adalbert*,
THE PRINZ bound from Philadelphia to Hamburg, was seized as prize at
ADALBERT. Falmouth on August 5, 1914, she had on board the two parcels of
 lubricating oil, respectively 290 and 86 barrels, which are now in
 question. The writ was issued on August 18, 1914.

The appellants, the Crew Levick Company, of Philadelphia, neutral shippers, filed a claim, dated April 1, 1916, alleging the oil to be their own and saying that they had shipped and consigned it to the Maschinenoel Import Actien-Gesellschaft, of Hamburg, as their agents for sale on the Continent of Europe, and that, as it had never passed to any purchaser, it had always continued to belong to them. The learned President decided that the oil had ceased to belong to the appellants on shipment. Neither the actual shipping documents nor the dates of the acceptances to the accompanying drafts appear to have been brought to his attention. At their Lordships' bar the appellants' argument made these dates crucial. The learned President was strongly and justly impressed by the absence of proper evidence of the prior course of dealing between the shippers and the consignees. The appellants petitioned their Lordships for leave to remedy this defect, but their Lordships refused to grant it for reasons of principle already given.

Both parcels were covered by bills of lading, which made the oil deliverable to the shippers' order at Hamburg and were indorsed in blank by an officer of the claimant company. The bills of lading and certificates of insurance were attached to drafts, drawn by the claimants on the Maschinenoel Import Gesellschaft and discounted in the United States, namely, a sixty days' draft for 75 per cent. of the invoice value of the 290 barrels, and a draft at three days' sight for the full value of the 86 barrels. The discounting bank forwarded the documents to Germany. The draft drawn against the 86 barrels reached Hamburg on or before August 1, 1914, on which date it was accepted by the Maschinenoel Import Gesellschaft against surrender of the bill of lading. The other draft was accompanied by a bill of lading of the same date, namely, July 20, and the evidence does not show any sufficient reason to suppose that it was not forwarded by the same mail. The appellants contended that it was not accepted till August 10, though no reason

for this difference could be given. This bill of lading also was handed over to the Maschinenoel Import Gesellschaft against acceptance of the corresponding draft, and ultimately that company returned both bills of lading to the claimants at Philadelphia. Presumably they also met both bills of exchange when they fell due, for the amounts are debited against the appellants in a quarterly account current, brought down to September 30, which they rendered to the claimants on November 28. It does not appear that the claimants have either paid or otherwise settled the debit balance shown on this account, and, as the evidence leaves the matter, they have received the proceeds of the two bills of exchange, less discount, in Philadelphia, have neither paid nor agreed to pay to the acceptors the amounts of those bills, and have got back the bills of lading from the acceptors, without conditions or explanation, and so, presumably, for the acceptors' account.

By general mercantile understanding, which has the force of law where transactions originate, like the present, in time of peace without prospect of war, the delivery of an indorsed bill of lading, made out to the shipper's order while the goods are afloat, is equivalent to delivery of the goods themselves, and is effectual to transfer ownership if made with that intention. The bill of lading is the symbol of the goods. Apart from specific formalities or similar prescriptions of municipal law, which are not now material, such intention is a question of fact. The usual course of dealing in the export of merchandise and the interest of the parties concerned in it suffice for the necessary inference in the absence of evidence to the contrary. When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading, indorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of

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the goods, authorizes and directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done. Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction, the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted.

Their Lordships are unable to agree with the learned President's view that the property in the oil in question passed on shipment. In their opinion the claimants were owners until the Maschinen-oel Import Gesellschaft accepted the drafts, drawn against the two parcels respectively, but no longer. Such is the true inference from the mercantile transactions themselves.

Sundry communications were produced, either requesting that the shipment should be made or advising that it had been made, but they are neutral in their effect; nor is it material to consider how the transaction might be worked out after the drafts had been accepted. This depends on arrangements between the parties, which are not properly proved, and the transfer of the ownership in the oil on the acceptance of the drafts is consistent either with a sale to the German company and a resale by them to German customers, or with some agency arrangement, under which they might debit the amount of the drafts paid and credit the proceeds of their sales to the claimants and obtain their own remuneration by charging an agreed commission.

It follows that the 86 barrels had ceased to belong to the claimants, and had become the property of the Maschinen-oel Import Gesellschaft on August 1. How stands the other parcel? The date when the draft drawn against it was accepted depends upon an entry in the quarterly account above mentioned. That account was prepared for the purpose of showing a general balance on September 30, 1914. The acceptance transactions are only incidents in it. The dates of the acceptances are immaterial to the account,

which, of course, reckons interest from the dates of payment, and are of small value even for the purpose of identifying the acceptances, which are sufficiently described by their amounts. The document is not proved, nor is it sufficient to discharge the onus, which is on the claimants. Even if the larger parcel of oil differs in its circumstances from the smaller one, at any rate it ceased to belong to the claimants before they came into Court to prove a claim as owners, and so their title fails. The probability is that there is no difference between the two parcels, and that the date of acceptance to the larger draft ought to be August 1 and not August 10. That both drafts should have been accepted together is natural, but that one, and that the larger of the two, should have been refused acceptance for over a week and then have received it is a very difficult supposition. If nothing else was known of the *Prinz Adalbert*, on August 10,* at least, it was known that she was considerably overdue. Capture was, at any rate, a reasonable explanation of her non-arrival. It may well have been that having, as the appellants' case says, "called at Falmouth after her master heard of the outbreak of war between France and Germany," she was already known in Hamburg, before August 10, "to have been seized as prize by the officer of Customs at Falmouth." If so, acceptance of the draft on August 10 is most improbable. Their Lordships, however, cannot act upon conjecture, and as the original exhibit bears the date of August 10 they have accepted it, and are content to say that, as the claimants failed to prove their right to the goods, when they came before the Court as owners, their appeal must also fail.

Accordingly their Lordships, being of opinion that the claimants were not owners of either parcel at or at any time after the commencement of the proceedings in prize in this case, will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Pritchards & Sons.*

Solicitor for respondent: *Treasury Solicitor.*

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[PRIVY COUNCIL.]

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FIDELITY AND CASUALTY COMPANY OF } APPELLANTS ;
 NEW YORK }

AND

MITCHELL RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

*Insurance (Accident)—Sprained Wrist—Latent Tuberculosis—Infection—
 Total Disablement—" Exclusively of all other causes."*

The appellants insured the respondent against bodily injury sustained through accidental means and resulting "directly, independently and exclusively of all other causes" in total disablement from performing the duties of his occupation. A statement by the respondent that he was in sound condition mentally and physically was made a warranty by the policy. After the issue of the policy the respondent by accidental means severely sprained his wrist. The appellants for seven quarters paid him the amount provided in the policy for total disablement, but then declined to make further payments. The respondent, being still disabled, sued upon the policy. It appeared that about ten or fifteen years before the date of the policy the respondent had suffered from a tubercular affection of a small part of his left lung, which had caused a lesion which had then healed. There were concurrent findings that at that date there was no active tuberculosis in respondent's arm, but that there was in his system tuberculosis which was latent and would have remained harmless had it not been for the accident, and that apart from tubercular infection the wrist would have recovered within six months of the accident:—

Held, that there was no breach of warranty, that the disablement resulted "directly, independently and exclusively of all other causes" from the accident, and that the respondent was entitled to recover under the policy.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (June 9, 1916), affirming the judgment of Middleton J.

The facts appear from the judgment of their Lordships. The policy sued on, in addition to the terms set out in that judgment, provided, by clause 11, "blood-poisoning resulting directly from a

* *Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR CHANNELL.

bodily injury shall be deemed to be included in the said term 'bodily injury.' " The proceedings in the Appellate Division are reported at 37 Ont. L. R. 335.

1917. June 10. *Sir John Simon, K.C., D. L. McCarthy, K.C., and M. W. Slade*, for the appellants. Upon the evidence, the respondent was not physically sound at the date of the policy; there was a breach of warranty. Secondly, if there was total disablement at the time of the action, it did not result from the accident "directly, independently and exclusively of all other causes." In the cases relied on by the plaintiff the policies or the Act (as to workmen's compensation cases) did not contain those or any similar words. This was not a case of a normal result to a normal person; there was an intervening cause. In *Mardorf v. Accident Insurance Co.* (1) it was conceded that the septic poison was introduced into the body at the time of the accident, whereas here the tubercular infection was latent. *In re Etherington and the Lancashire and Yorkshire Accident Insurance Co.* (2) was a case of pneumonia following a hunting accident as a normal result in a normal person. Clause 11 of the policy strongly supports the appellants' argument. *Coyle v. John Watson, Ltd.* (3) and *Drylie v. Alloa Coal Co.* (4) were also referred to.] Thirdly, upon the evidence, there was not a total disablement.

P. O. Lawrence, K.C. and *J. D. Montgomery*, for the respondent, were not called upon.

July 27. The judgment of their Lordships was delivered by

LORD DUNEDIN. The plaintiff in this case sues on an accident policy dated February 10, 1913. The policy is in the following terms, omitting such parts of the document as are immaterial to the questions raised :—

"The Fidelity and Casualty Company of New York (herein called the company) does hereby insure the person (herein called the assured) named in statement A of the schedule of warranties against—

"(1.) Bodily injury sustained during the term of one year from

(1) [1903] 1 K. B. 584.

(2) [1909] 1 K. B. 591.

(3) [1915] A. C. 1.

(4) 1913 S. C. 549.

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noon, standard time, of the day that this policy is dated, through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane), and resulting directly, independently and exclusively of all other causes, in—(a) Immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation.

* * * * *

“ACCIDENT INDEMNITIES.

“TOTAL DISABILITY.—Article 5. If the assured suffers total disability, the company will pay the assured so long as he lives and suffers said total disability seventy-five dollars a week.

* * * * *

“DOUBLE INDEMNITIES.—Article 9. The amounts specified in articles 5, 6, 7, and 8 shall be double if the bodily injury is sustained by the assured . . . (2.) while in or on a public conveyance (including the platform, steps, and running-board thereof) provided by a common carrier for passenger service.”

On May 30, 1913, being within twelve months of the date of the policy, the plaintiff was travelling in a sleeping car on the railway, and was thrown out of his berth on to the floor of the car. He was rendered insensible and was afterwards found to have severely sprained his wrist. The wrist did not get better, and it is now in such a condition as entirely to prevent him using his hand so as to perform such operations as are part of the necessary work of a throat, ear, and eye specialist. The defendant company paid the weekly allowance of 150 dollars down to March 1, 1915. After that they refused to pay, and this action is for the quarterly payment due on May 30, 1915.

Before the trial judge the defendants, while admitting the notification of the accident, pleaded that if the accident had happened there had been complete recovery from its effects, or if there had not been complete recovery, that such non-recovery was due to inattention on the part of the plaintiff and a fraudulent design on his part to prevent the injury healing. These pleas were emphatically negatived by the trial judge, whose verdict on this matter was unanimously confirmed by the Court of Appeal; and they have not been insisted on before this Board.

The defendants, however, had three other pleas which, though repelled by the learned trial judge and unanimously by the learned judges of the Court of Appeal, have been argued before their Lordships. They were: (1.) That there was breach of warranty on the part of the plaintiff, who was thereby disentitled to sue on the policy. (2.) That the injury sustained by the plaintiff through accidental means did not independently, exclusively of all other causes, result in immediate continuous and total disability. (3.) That the disability does not prevent him from performing any and every kind of duty pertaining to his occupation.

This last plea may be at once disposed of. His occupation is that of a specialist in work on eye, ear, nose, and throat. The learned judges have all held that a man with a totally disabled hand cannot in any fair sense perform any and every kind of duty of that occupation. With that finding of fact their Lordships entirely agree.

As regards pleas 1 and 2, some further explanation is necessary. It is the fact that there is present in the plaintiff a part of the chest where there is dulness on percussion, which indicates that at a previous period, probably some ten or fifteen years before the accident, there had been a tubercular affection of a small part of the lung. The lesion in the lung had healed, and there was no active trouble in the chest. There was no positive evidence of an actual tubercular condition of the wrist; but a sprain, however severe, would normally get better in some six months or so, and would not settle down into the chronic condition which was here disclosed.

Upon this evidence, and upon the somewhat conflicting evidence of the doctors examined, the trial judge and the judges of the Court of Appeal came to the same conclusion as to findings of fact. These findings were accepted by the counsel for the defendants; and even had they not been so accepted, their Lordships would have been slow to disturb them. They may be summarized thus: There was no active tuberculosis in the arm, but there was present in the plaintiff's system tuberculosis in some form; such tuberculosis—the lesion in the lung having completely healed—was latent, and would have remained harmless had it not been for the accident.

As regards the first plea on the warranty, their Lordships have no hesitation in coming to the same conclusion as the Courts below.

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The plaintiff has no apparent disease, and would have been passed sound by any doctor who might have examined him, and the statement in the schedule of warranties, that he was in "sound condition, mentally and physically," was true.

The more difficult and delicate part of the case is in relation to the second plea. It was strenuously urged by the appellants that the disability here could not be said to be caused by the accident independently of another cause; the other cause being the tuberculous condition, without which there would not have been continuous disability, as the sprain would have passed away in ordinary course.

The point is narrow and not without difficulty. But their Lordships agree with the result reached in the exceedingly careful and able judgment of Middleton J., confirmed unanimously by the learned judges of the Court of Appeal. His view is most tersely expressed in a single sentence: "This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident."

Their Lordships agree with the learned counsel for the appellants, who argued that the matter is not concluded by the cases on the Workmen's Compensation Act. What is there sought is a chain of causation starting from the accident without (to use the phrase used in the House of Lords in *Coyle's Case* (1)), "any intervening circumstance to break the chain of causation." What has got to be determined here is the construction of this clause.

What is insured against is, first, bodily injury sustained through accidental means. As to that, there is no difficulty. The wrist has been injured by an accidental fall. Then, secondly, this bodily injury must result in immediate continuous and total disability that prevents the assured, &c. This, also, is clear. The wrist was disabled at the moment of the fall, and has been disabled ever since. The point as to preventing the assured from doing work has been already dealt with. But then comes the third condition, which is the critical point. This bodily injury, sustained through accidental means, and resulting in disability, must so result "directly, independently and exclusively of all other causes." Now the expression "other causes" postulates a cause already specified.

(1) [1915] A. C. 1.

The word "cause" has not, so far, been used in the sentence, and it must therefore be found in the words "accidental means." Therefore there must be independency between cause 1 (the accident) and cause 2, whatever that may be. But in this case, on the view of the facts taken by both Courts—with which their Lordships agree, and which in any case they would be slow to disturb—there is no independency between the alleged second cause (the tuberculous state) and the first cause (the accident). Prior to the accident there was only a potestative tuberculous tendency; after it, and owing to it, there was a tuberculous condition. In other words, the accident had a double effect—it sprained the tendons and it induced the tuberculous condition. These two things acted together, and were the reason of the continuing disability; but while they are both ingredients of the disabled condition, there has been and is, on the true construction of the policy, only one cause, namely, the accident.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. The respondent, in terms of the order granting special leave to appeal, will have the costs of the appeal taxed as between solicitor and client.

Solicitors for appellants : *Collyer-Bristow & Co.*

Solicitors for respondent : *Blake & Redden.*

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VANCOUVER POWER COMPANY, LIMITED APPELLANTS;
 AND
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 ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
 COLUMBIA.

*Municipal Corporation—Electric Light Company—Agreement—Right to
 purchase System—Severance of Municipal District.*

By an agreement made in 1905 the respondents, a municipal corporation, granted to the appellants exclusive power to construct and operate an electric light system within the municipal district, it being provided that at the expiration of ten years the respondents, upon giving twelve months' notice, might assume the ownership of the system within the district, subject to the payment of compensation. By a statute passed in 1907 part of the district was formed into a new municipality, the statute providing that the above-mentioned agreement should be "adopted and carried into effect" by the municipality so created. In 1914 the respondents gave the appellants notice of their intention to assume the ownership of the system:—

Held, that the respondents were entitled to assume the ownership of the system throughout the district as it existed at the date of the agreement.

APPEAL from a judgment of the Court of Appeal of British Columbia (April 4, 1916) affirming the judgment of Murphy J. at the trial.

The facts and the arguments sufficiently appear from the judgment of their Lordships.

1917. July 2. *Upjohn, K.C., T. Paine, and H. B. Robertson*, for the appellants.

E. P. Davis, K.C., and Hon. M. Macnaghten, for the respondents.

July 30. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This appeal is brought from a judgment of the Court of Appeal of British Columbia, dated April 4, 1916, dismissing an appeal by the appellants against the judgment of Murphy J., dated June 29, 1915.

* *Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

The respondents, the corporation of the district of North Vancouver, are a municipality incorporated under the Municipal Act of the province of British Columbia. On August 16, 1905, they entered into an agreement with the appellants, the Vancouver Power Company, Limited, granting to the latter power for the construction, maintenance, and operation, within the limits of the district, of all the works, power-houses, buildings, poles, and wires required "for the generation, distribution, and sale of electricity for light, heat, and power, and any other purpose." By clause 11 of that agreement a monopoly or exclusive right was granted to the company.

By the same clause 11, however, it was provided: "But at the expiration of ten years from the said date of this agreement the corporation may, upon giving at least twelve months' prior notice in writing of its intention to do so, assume the ownership of the electric lighting system within the limits of the district, together with all the real and personal property of the company used, in use, or to be used in the operation of the lighting system within the limits aforesaid, upon payment being made by the corporation to the company of the value of the said lighting system as a going concern, but not including any payment for goodwill."

On May 13, 1907, a portion of the district municipality described in Schedule B to c. 35 of the Acts of British Columbia, 1906, was incorporated as the city of North Vancouver. The provisions of that Act will be presently referred to. On August 14, 1914, the respondents, the corporation of the district, gave notice of their intention, in terms of clause 11 of the agreement, to assume the ownership of the electric lighting system. No objection is taken to the form of this notice, and it is, of course, admitted that it was given in time.

The proceedings out of which the present appeal arises were by way of special case; and the action was begun on June 14, 1915. The facts are set out in the case, and the question for decision is formulated as follows: "Whether the plaintiff by reason of having given the said notice of intention to purchase is entitled at the expiration of ten years from August 16, 1905, to assume ownership of the electric lighting system of the defendant, situate within the area comprising the city of North Vancouver and within the area comprising the district of North Vancouver, together with all the real

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and personal property of the defendant used, in use, or to be used in the operation of the said lighting system within the said areas upon payment therefor in the manner provided in the said agreement.”

That question was answered by both Courts in the affirmative, and their Lordships are of opinion that that answer was correct.

The appellants, the Vancouver Power Company, present an argument to the effect that the notice is invalid, in consequence principally of the city of North Vancouver having been carved out of the district as already stated. Part of the company's operations and plant are within the city ; part extends beyond the city bounds and into other portions of the district. So far as practical working is concerned, the incorporation of the city as a separate municipality seems to have imported no change in the working of the system of the appellants as a unity, a unity which covers territory both within and beyond the city. Under these circumstances one could have imagined a strong objection being formulated to any attempt by a separate city notice—applicable only within the city bounds—to terminate the agreement for the city itself, thus splitting up the ownership of the concern and producing in all likelihood an unworkable business result. The present objection, however, is to a notice which has been given exactly in terms of the agreement, by the party with whom the agreement was made, namely, the respondent district municipality, and covering the exact case provided for, namely, the entire locality to which the agreement applied. In their Lordships' opinion the incorporation of the city of North Vancouver did not result in dividing the agreement of August 16, 1905, into two agreements.

It was contended, however, that the carving out of the city from the district produced such a state of matters as to make the provision as to the taking over of the ownership of the concern at the end of the ten years unavailing, and thus impliedly to operate the repeal or deletion of that provision.

This contention is manifestly much in the interest of the appellants ; but, in their Lordships' opinion, it is without foundation either on the statute or on the agreement.

Sect. 23 of the City of North Vancouver Incorporation Act, c. 35 of 1906, is in these terms : “ The three agreements made by the corporation of the district of North Vancouver with the Vancouver

Power Company, Limited, for street car service, street lighting, and the supply of electric light and power, respectively, and the agreements made by the said corporation with the British Columbia Telephone Company, Limited, and the Vancouver Ferry and Power Company, Limited, in so far as the several agreements affect the area by letters patent under this statute incorporated as the city of North Vancouver, are hereby ratified and confirmed, and shall be adopted and carried into effect by the council of the city of North Vancouver, but in other respects the said companies shall be subject to the ordinary jurisdiction of the council."

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On a true construction of this section it appears to the Board that the agreements scheduled in the Act are not in any respect destroyed or repealed so far as the city is concerned, but on the contrary are ratified and confirmed, the effect of this being to preserve intact the rights of both parties, that is to say, on the one hand of the Power Company, and on the other of the district municipality. It follows from this that the right of acquisition in the latter body is not abrogated, but remains unimpaired. In the second place, however, the city authorities having come into power within the city area, the Act very naturally provides that in so far as the city is concerned the provisions of the agreement affecting the city area shall be adopted and carried into effect by the city council. No occasion arises for attempting to give any technical definition or consideration to these simple words, "adopted and carried into effect," and no difference or dispute between city and district is before their Lordships or is even suggested. The sole point before the Board is raised by a third party, namely, the Power Company, as to the alleged effect of the separate creation of the city upon the clause as to the assumption of ownership at the end of ten years. Their Lordships are of opinion that the right to assume ownership remains as in the agreement, and that, the conditions of the assumption—namely, that proper notice be given—having been complied with, the objection of the appellants is unsound.

Their Lordships will humbly advise His Majesty that the appeal be disallowed with costs.

Solicitors for appellants : *Linklater, Addison & Brown.*

Solicitors for respondents : *Armitage, Chapple & Co.*

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[PRIVY COUNCIL.]

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Aug. 3.

CANADIAN NORTHERN PACIFIC RAILWAY } APPELLANTS ;
 COMPANY }

AND

CORPORATION OF NEW WESTMINSTER . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
 COLUMBIA.

*Canada (British Columbia)—Railway—Exemption from Taxation—Lands
 forming Part of Railway—Approval of Plans—Condition—
 R. S. B. C., 1911, c. 194, ss. 17, 18.*

By an Act of the Legislature of British Columbia the appellant company “and . . . all properties and assets which form part of, or are used in connection with, the operation of its railway” were exempt from taxation. The Railway Act of British Columbia (R. S. B. C., 1911, c. 194) provides that a company proposing to make a railway shall make a plan, profile, and book of reference which by s. 18 are to be submitted to the Minister, who, if satisfied therewith, may sanction the same :—

Held, that land purchased by the appellants with the intention of using it for their railway was not exempt from taxation until the plan, profile, and book of reference of the railway proposed to be constructed thereon had been submitted to and approved by the Minister.

APPEAL from a judgment of the Court of Appeal of British Columbia (February 1, 1917) affirming the judgment of Murphy J.

The facts and relevant statutory enactments appear from the judgment of their Lordships.

The Court of Appeal considered themselves bound by a previous decision of that Court (Macdonald C.J.A., Martin J.A., and Galliher J.A. ; McPhillips J.A. dissenting), delivered on November 2, 1915, in proceedings by appeal from an assessment made upon the appellants.

1917. July 12. *Maugham, K.C.*, and *E. P. Davis, K.C.*, for the appellants.

* *Present* : VISCOUNT HALDANE, LORD DUNEDIN, and SIR ARTHUR CHANNELL.

Joseph Martin, K.C., for the respondents.

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The arguments appear from the judgment. Reference was made to the Statutes of British Columbia for 1910, c. 3, Sched., clause 13, sub-ss. (d), (e), and c. 4, ss. 17, 34, 37; the British Columbia Railway Act (R. S. B. C., 1911, c. 194), ss. 16, 17, 18; the definition of "railway" in R. S. B. C., 1897, c. 163, s. 3; and the Statutes of British Columbia, 1913, c. 58, s. 7.

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Aug. 3. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. This appeal raises the question whether certain lands belonging to the appellants (the Canadian Northern Pacific Railway Company) and within the city of New Westminster, in the province of British Columbia, are exempt from taxation by the respondents, the corporation of that city. The Court of Appeal of British Columbia has held that whatever may be the case after the appellants have deposited plans pursuant to s. 17 of the British Columbia Railway Act, 1911 (c. 194), and have got such plans approved by the Minister under s. 18, at all events the lands in question are not exempt until such plans have been so deposited and have been so approved. That has not been done yet. (1) From that decision the present appeal is brought.

The exemption which the appellants claim, and which they allege extends to the lands in question, arises in a rather peculiar manner. Another company, the Canadian Northern Railway Company, governed by Dominion Acts of Parliament, was minded to get, in connection with their own line of railway, a line through the province of British Columbia, but instead of getting direct authority to extend their own line they procured the incorporation of the appellant company by an Act of the Legislature of British Columbia (10 Edw. 7, 1910, c. 4). Prior to that incorporation an agreement (dated January 17, 1910) had been made between His Majesty the King (acting by the Minister of Mines for British Columbia) and the Canadian Northern Railway Company containing many provisions which could not have been made effective except by Act of Parlia-

(1) The appellants had submitted a plan, profile, and book of reference to the Minister, but the respondents contended that they

did not comply with the requirements of s. 17; no approval had been granted under s. 18.

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ment, and that agreement had been ratified by an Act of the Legislature of British Columbia (1910, c. 3), which said that the provisions of the agreement were to be "taken as if they had been expressly enacted hereby and formed an integral part of this Act." The agreement is set out in a schedule to this Act, and clause 13, sub-s. (e), of the agreement reads thus: "The Pacific Company and its capital stock, franchises, income, tolls, and all properties and assets which form part of or are used in connection with the operation of its railway shall, until the first day of July, 1924, be exempt from all taxation whatsoever, or however imposed, by, with, or under the authority of the Legislature of the province of British Columbia, or by any municipal or school organization of the province." On the argument some question was raised by the respondents' counsel as to the operation of this provision, and as to its binding effect, but the Board are clearly of opinion that it operates as if it were a clause in an Act of the Provincial Legislature, and is binding on the city of Westminster with the force of such an Act.

The sole question in the appeal, therefore, is as to the true construction of clause 13, sub-s. (e), but there are, both in the agreement and in other Acts of the Legislature, provisions which have to be considered in arriving at the true construction. The lands in question have undoubtedly been purchased by the Pacific Company with the intention that they shall be ultimately part of the railway and be ultimately used in connection with the operation of the railway, and the question for consideration is whether they can be said now to come within the words as being now part of the railway used, as described in the clause. The precise position of the railway track cannot be known until the plans required by s. 17 already referred to have been deposited and approved. The Minister has the power of directing the line to be made in a position in which the lands in question would not form part of the track, but it is contended, and the Board think rightly contended, that the company might still use the lands in some other way connected with the railway. It is contended also that the word "railway" in the clause in question does not merely refer to the track, but is to be read with the definition of "railway" in s. 2 of the British Columbia Railway Act, 1911 (c. 194), which is a mere re-enactment of a similar definition in Acts which were in force in 1910.

That definition includes in the term "railway" "all branches, sidings, stations, depots, wharves, rolling-stock, equipment, works, property, real or personal, and works connected therewith, and also every railway bridge, tunnel, or other structure connected with the railway and undertaking of the company." The things so brought by definition into the term "railway" are all physical things, as the railway itself is. The definition does not bring into "railway" the whole "undertaking" of the company. Manifestly it cannot be intended by the words of clause 13, sub-s. (e), to exempt all the property of whatever kind of the Pacific Railway Company, because if so, almost all the words of the clause would be surplusage. Counsel for the appellants, in his very able argument, pointed out that the Pacific Railway Company was not merely a railway company, but had power to construct and operate telegraph lines (s. 4), telephone lines (s. 5), steamships (s. 7), wharves, docks, and elevators (s. 8), and coal mines (s. 9), and also to deal in a special way with town sites, and he suggested that "railway" in clause 13, sub-s. (e), should be held to include the whole undertaking of the company so far as it was a mere railway company, and that the clause was framed as it is to prevent the exemption extending to lands and things connected with operations of the company otherwise than as a mere railway company. This, however, is giving to the word "railway" a meaning which, in the opinion of the Board, it cannot bear. It is used in the clause as denoting a physical thing, of which something else can form part and which can be "operated." The mere fact, therefore, that these lands are the property of the company, and that the intention with which they were purchased may earmark them as owned by the company in their capacity of a railway company proper, is not of itself enough, in the opinion of the Board, to bring them within the exemption. Clause 13, sub-s. (d), was called in aid. That says that the portions of lands acquired under that clause for the Government which should be required for the purposes of the Pacific Company "will, as the property of the company, come within the railway exemption clause herein" (referring to sub-s. (e)). This merely says that the exemption of these lands will be dealt with under the clause, and certainly throws no light on the question when the exemption of them is to begin.

It is essential to the argument of the appellants that the Board

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should read the words "which form part of and are used" as including lands "acquired for the purpose of forming part of and being used," but the words of the clause are in the present tense, "form part and *are* used," and clause 9 of the agreement, quoted in the judgment of McPhillips J.A., gives the Government security over the property of the company "acquired for the purpose of and used in connection with" the lines and ferry, thus showing that the framers of the agreement, and the Legislature which adopted the words of it, had in their minds the distinction between lands acquired for the purpose of being hereafter used and lands actually now used.

To read the clause in the way desired would be to add to it words which are not to be found in it, and it appears to the Board that there is nothing in the context or in the object of enactment, or in the incorporated enactments, which make it necessary or justifiable to read in the necessary words.

The company are no doubt justified in buying land which they expect they will want for the railway before getting their compulsory powers, and they are probably in most cases acting providently in doing so, as they may have to pay more for the lands when they come to exercise their powers, but there seems no reason for giving the exemption to such lands as soon as they become the property of the company. They may remain for some time in use for the purpose for which they have previously been used. In this case the lands are said to include some mills and such like buildings still being used as before. Why should they be exempt from taxation to cheapen the ultimate cost to the company of the lands required for their undertaking, when the public are neither getting the actual railway, nor having it already in process of construction for their ultimate benefit? The benefit expected to the public from the railway is of course the consideration for the remission of taxation. From the time the lands are definitely appropriated as part of the railway and taken from other uses there appears reason for the exemption, and at any rate it is then clearly given. As to the period when lands have been purchased for the purpose of being ultimately used in some way or other for the railway, including the case when the mode of user has been decided on by the company, subject only to the Minister's power to direct alteration of the proposed plans, but when nothing further has been done, there seem no express

words to give the exemption, and no such necessity as would justify the Board in putting on the words which are used the meaning necessary to give it.

This conclusion is supported by considering the difficulty in which the taxing authority would be placed by an exemption depending not upon facts, of which they would necessarily have notice, but upon the intention of the company, not publicly disclosed, as to the use to be made of lands not yet entered in the Land Register as owned by them. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

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TION.

Solicitors for appellants : *Linklater & Co.*

Solicitors for respondents : *Blake & Redden.*

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PACIFIC COAST COAL MINES, LIMITED, }
AND OTHERS. } APPELLANTS ;

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ARBUTHNOT AND OTHERS RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
COLUMBIA.

*Company—Ultra vires—Agreement—Validating Statute subject to adop-
tion by Resolution—Defective Notices of Meeting—Acquiescence
immaterial.*

Certain shareholders in, and directors of, a company registered under the British Columbia Companies Acts entered into an agreement between themselves, the company being a party, whereby an action against the directors as promoters was dismissed and all claims therein released by the company, and it was provided that the shares held by a group of shareholders, including directors, were to be surrendered in exchange at par for debentures to be created and issued by the company, the capital of the company being reduced from three to two million dollars. The company, in pursuance of the agreement, obtained a private Act whereby the agreement was “validated, ratified and confirmed, subject to the

* *Present* : VISCOUNT HALDANE, LORD DUNEDIN, and LORD SUMNER.

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same being adopted by a resolution passed by 75 per cent. of the shareholders present, personally or by proxy, at any meeting of the shareholders called for that purpose." A resolution was passed by the required majority, but the notices convening the meeting did not state the effect of the agreement, and the proxies of shareholders who before the meeting had no opportunity of knowing the contents of the agreement were used in support of the resolution. The articles of association provided that in case of special business the notice should state its general nature. Four years later, when, as it was contended, the shareholders had by their acts and conduct adopted and acquiesced in the agreement, the company and two shareholders, suing on behalf of all, brought an action to set aside the trust deed creating the debentures, and the debentures issued thereunder:—

Held, that the Act made the adoption of the agreement in the manner thereby prescribed a condition to its validity; that the resolution was ineffective owing to the absence of notice of the contents of the agreement; and that the agreement and the acts done in pursuance of it were consequently ultra vires the company and incapable of being made valid by acquiescence on the part of the shareholders.

APPEAL from a judgment of the Court of Appeal of British Columbia (October 3, 1916) reversing a judgment of Clement J. (January 7, 1916).

The action was brought in the Supreme Court of British Columbia by the appellants, the Pacific Coast Coal Mines, Limited, and two shareholders therein (suing on behalf of themselves and all other shareholders) for a declaration that a debenture trust deed, dated March 1, 1911, and the issue of debentures thereunder were improperly and illegally made, and for ancillary relief. They also claimed to recover from certain of the respondents secret profits alleged to have been made in the promotion of the company; this claim was abandoned upon the present appeal.

The facts are stated in the judgment of their Lordships.

Clement J., who tried the action, gave judgment for the appellants upon both causes of action, and made the declarations mentioned in the footnote to this report at p. 619.

The Court of Appeal reversed the judgment, and dismissed the action. Macdonald C.J. (with whose judgment Galliher J.A. agreed) held in substance that, even if the meeting at which the agreement of February 11, 1911, was adopted was not properly convened, the carrying out of the agreement was not ultra vires the company

but merely ultra vires the directors, and that it was capable of being, and in fact had been, ratified and acquiesced in by the shareholders. Martin J.A. held that the notices were sufficient, and that the agreement had been duly adopted in accordance with the private Act.

The articles of association of the appellant company mentioned in the footnote (1) were material to the argument.

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1917. July 2, 3, 5, 6. *Gore-Browne, K.C., W. J. Taylor, K.C., and Owen Thompson*, for the appellants. The adoption of the agreement in the manner prescribed by the private Act was a condition to its validation; without that adoption the agreement was ultra vires the company: *Trevor v. Whitworth* (2); *Welton v. Saffery*. (3) The notices convening the meeting were defective under art. 55, in that neither those sent by post, nor that posted up at the office under art. 118, stated the effect of the agreement; the directors being interested parties it was essential that the shareholders should have full knowledge: *Kaye v. Croydon Tramways Co.* (4); *Tiessen v. Henderson* (5); *Normandy v. Ind, Coope & Co.* (6); *Baillie v. Oriental Telephone and Electric Co.* (7); *Cook v. Deeks*. (8) The agreement was ultra vires the company and could not be made good by ratification or acquiescence on the part of the shareholders: *Ashbury Railway Carriage and Iron Co. v. Riche*. (9) If, however, the

(1) Art. 55 provided: "Seven days' notice at least of every general meeting specifying . . . in case of special business, the general nature of such business, shall be given to the members in the manner hereinafter provided." Art. 100 (9.) gave the directors power to compound or abandon actions concerning the affairs of the company. Art. 116 provided for the service of notices by post; and by art. 117 any member whose registered address was not in British Columbia might notify an address within the province, which was to be deemed his registered address for service. Art. 118 provided that, as regards

those members who had no registered address in British Columbia, a notice posted up in the office of the company should be deemed to be well served at the expiration of twenty-four hours. Art. 71 provided a proxy form which could be given either in respect of any specified meeting, or in respect of any meeting during the year. The proxies used were in the latter form.

(2) (1887) 12 App. Cas. 409.

(3) [1897] A. C. 299.

(4) [1898] 1 Ch. 358.

(5) [1899] 1 Ch. 861.

(6) [1908] 1 Ch. 84.

(7) [1915] 1 Ch. 503.

(8) [1916] 1 A. C. 554.

(9) (1875) L. R. 7 H. L. 653.

J. C. agreement was merely ultra vires the directors it could be validated
 1917 only by acquiescence or ratification on the part of all the share-
 PACIFIC holders : *Spackman v. Evans* (1) ; *Evans v. Smallcombe*. (2) There
 COAST COAL was no evidence whatever of ratification, which is to be distinguished
 MINES, from acquiescence, and the evidence did not show acquiescence by
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 ARBUTHNOT. all the shareholders.

E. P. Davis, K.C., H. B. Robertson, and Hon. M. Macnaghten, for the respondents. The notices were good and the resolution validly passed. The sufficiency of the notices depends upon all the circumstances, including the knowledge which the shareholders had of the matter : *Baillie v. Oriental Telephone and Electric Co.* (3) In the present case the evidence shows that the shareholders knew of the scheme, and that the proxies were given for the year 1911 expressly to carry it out. As was found by the Chief Justice, the present suit was brought at the instance of the shareholders who put forward the scheme. The notices referred to the agreement and stated where it could be inspected ; that was equivalent to setting it out : *New Sombrero Phosphate Co. v. Erlanger*. (4) Under art. 100 (9.) the directors had power to consent to the withdrawal of the action against the promoters apart from the resolution. The notice posted up under art. 118 could not in any case have given information to the shareholders outside the province ; a defect in it does not affect the validity of the resolution : *In re Union Hill Silver Co.* (5) ; *Halifax Sugar Refining Co. v. Francklyn*. (6) Even if the resolution was not an effective adoption, the agreement was not ultra vires the company, but merely ultra vires the directors. The private Act validated the agreement subject to its adoption ; the issue of the notices was merely a matter of internal management. The terms of the private Act are substantially the same as those considered in *Irvine v. Union Bank of Australia*. (7) Any defect in the procedure could therefore be made good by acquiescence : *Phosphate of Lime Co. v. Green*. (8) By the directors' report made in August, 1911, the shareholders were informed that the various acts contemplated by the agreement had been carried out, but no steps were taken by

(1) (1868) L. R. 3 H. L. 171.

(2) (1868) L. R. 3 H. L. 249.

(3) [1915] 1 Ch. 503.

(4) (1877) 5 Ch. D. 73, 111.

(5) (1870) 22 L. T. 400.

(6) (1890) 59 L. J. (Ch.) 591.

(7) (1877) 2 App. Cas. 366.

(8) (1871) L. R. 7 C. P. 43.

the shareholders or the company until February, 1915, when the present action was commenced. The appellants acquiesced in and ratified what had been done. They are estopped since the circumstances have now materially altered, the control of the majority of the shares having passed into different hands, and the financial position of the company being greatly deteriorated.

Gore-Browne, K.C., replied.

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Aug. 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Court of Appeal of British Columbia, which reversed the judgment of Clement J., who tried the action. The proceedings were brought by the appellants as plaintiffs to set aside a trust deed dated March 1, 1911, made between the appellants and the respondents, the British American Trust Company, Limited, for securing payment of 1500 debentures of 1000 dollars each, carrying interest at 6 per cent., and the debentures issued thereunder, and also to recover from certain of the respondents secret profits alleged to have been made by them as vendors to and promoters of the appellant company.

As to the last claim, it was abandoned in this appeal, it being admitted that at the time when the properties were acquired by the vendors it could not be shown that they had become promoters, and further that rescission had become impossible. To that extent, at any rate, the judgment which allowed this claim at the trial cannot stand. The real question which remains is one on the answer to which the validity of the trust deed depends, namely, whether an agreement can stand which was made on February 11, 1911, between certain of the respondents, the appellant company and other persons. This agreement was undoubtedly ultra vires of the appellant company unless it was validated by a private Act of the Legislature of British Columbia passed subsequently to its date on March 1, 1911. Under that Act the agreement was validated, but only subject to its adoption by resolution passed by a specified majority of the shareholders called for the purpose of adopting it, and of issuing the debentures already referred to. The decision on the appeal really turns on the single question whether the provision thus required by the validating statute was one of internal management only, the non-observance of which could be cured by the acquiescence of the

J. C. shareholders, or whether it laid down a condition of the agreement
 1917 becoming *intra vires*. In the latter alternative, and if it was not
 PACIFIC observed, it is not in serious controversy that no amount of acquies-
 COAST COAL cence by the appellant company and its shareholders should cure the
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ARBUTHNOT. In order, however, to state intelligibly how the point has arisen, it
 ————— is necessary to refer to the transactions which led up to the agree-
 ment and to the passing of the private Act.

The appellant company was incorporated under the Companies Acts of British Columbia on March 21, 1908, for the purpose of acquiring and working mining properties and selling the produce. The first directors were the respondents, Arbuthnot, Savage, McGavin, Moran, Reynolds, and two defendants, Wishard and Hodgson, who are not parties to the appeal. The capital of the company was 3,000,000 dollars, divided into 30,000 shares of 100 dollars each. The property which the company was incorporated to purchase belonged to the promoters, who were also directors, and remained directors until March, 1911, the date of the agreement in controversy. This property consisted of various blocks of land and Government licences for coal prospecting, carrying with them mining rights. These licences had been secured by the defendant Hodgson, and by the time the appellant company was incorporated Arbuthnot and others of the directors had become interested in them along with him. One of the blocks of land had originally belonged to Hodgson for a term under a lease with an option to purchase. He had assigned it to Arbuthnot, who had incorporated a company, the South Wellington Coal Mines, Limited, to which he sold it. That company was under Arbuthnot's control. On the incorporation of the appellant company he transferred to it 3800 shares which he held in the South Wellington Company, as well as his interest in one of the blocks of land for 350,000 dollars. Two of the other blocks and the licences were at the time of the incorporation of the appellant company held by a company called the Vancouver Island Timber Company in trust for the persons interested in them respectively. These persons included Arbuthnot, Hodgson, and others of the directors who are respondents. The promoting vendors appear to have been desirous of so arranging their voting power in the appellant company that they should be

able to exercise a steady control. They accordingly transferred a large number of their shares in it to a holding company, incorporated in the province of Manitoba, by Arbuthnot, who became its president and obtained its proxy. It was named the Pacific Securities Company, Limited. The result of this was to place the controlling power in the hands of the British Columbia group of shareholders, and to leave a body of shareholders in New York, who were represented by the defendant Wishard, in a minority. Hodgson, who was no longer on the board of the appellant company, at this point became dissatisfied. His shares were in the pool and in the hands of the Pacific Securities Company, and he could no longer make his influence felt. He therefore in June, 1910, began an action, the purpose of which was to break up the new pooling arrangement. In this action grave charges were launched against Arbuthnot and his associates, in connection not only with the formation of the Pacific Securities Company, but with the promotion of the appellant company. Wishard and two others named Kimball and Michener, who also belonged to the group of New York shareholders, were in sympathy with Hodgson, who relied on their co-operation in dethroning the British Columbia group. The latter became alarmed, and the suggestion appears to have emanated from them that the New York group should buy out the British Columbia group by letting them have debentures of the appellant company in place of their shares and, in addition, for the amount due to them under their contracts with the appellant company. One Hartman, a lawyer practising in Seattle, was then instructed to act for the New York group in negotiating and preparing an agreement on these lines. This was finally done, with the result that Hodgson's action was dismissed by consent.

The agreement was finally adjusted and entered into on February 11, 1911. The parties to it were the respondents Arbuthnot, Savage, and McGavin of the first part, representing the British Columbia group; Hartman and Michener of the second part, who were defendants in the present action but did not appear in this appeal, and who represented the New York shareholders; the appellant company of the third part; Hodgson and an associate, who had an interest in his shares, called Spencer, of the fourth part; and the respondent Reynolds of the fifth part. The agreement

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recited the circumstances of the incorporation of the appellant company and the purchase of its properties ; the transfer of shares held in it to the Pacific Securities Company in accordance with a pooling agreement made in 1908 ; the indebtedness of the appellant company to the Merchants Bank of Canada and a guarantee for this indebtedness given by certain of the directors ; the institution of the Hodgson action ; and the holding of shares in the appellant company by Reynolds. The agreement then provided, among other things, for the dismissal of the Hodgson action without costs ; for the execution of a trust deed to secure debentures ; for the issue of 1,500,000 dollars of such debentures, out of which the members of the British Columbia group and others whom they represented were to receive amounts equal to the par value of their respective shares ; for the surrender and extinction of such shares, an order of the Court to be obtained if necessary for the purpose ; for the consequential reduction of the appellant company's capital to 2,000,000 dollars ; for the holding of the meeting or meetings of shareholders necessary for the ratification and adoption of the agreement and for carrying out its terms ; for the ratification and adoption of all the acts of the Vancouver Island Timber Company and of the promoters of the appellant company, and for a complete release to the latter of all claims against them in connection with such promotion ; for the parties making such use of their votes in respect not only of their own shares, but of shares which they represented by proxy, as would give effect to the agreement ; for an application to the Legislature of British Columbia for an Act to authorize the reduction of capital, the surrender of shares, and the issue of debentures as provided by the agreement, and the agreement itself ; and for the resignation of their directorships of the appellant company by Arbuthnot, Savage, Moran, and Reynolds. The agreement contained other provisions less germane to the questions now raised and which need not be referred to specifically.

The provincial Legislature was then in session at Victoria, and on February 14, three days after the agreement was signed, a petition for a private Act was presented. A Bill was introduced which became law on March 1. In anticipation of the passing of the Act the directors sent out notices from the appellant company's office calling a meeting of shareholders for that day.

But for this statute the directors, had they desired to obtain the reduction of capital contemplated, must have applied to the Court under the Companies Act, 1910, of British Columbia. The application must have been founded on a special resolution which would have required two meetings, and the Court must have satisfied itself that it was cognizant of all possible claims from creditors, and that these creditors had consented or had had their claims satisfied. It is probable that, having regard to the nature of the story of the Hodgson action, and to other matters referred to on the face of the agreement, the Court, had it been applied to, would have made inquiry and looked carefully before pronouncing the order asked for. It was an advantage which would accrue to the directors if they could obtain a private Act that they would be dispensed both from delay and further scrutiny.

The provisions of the Act which was passed on March 1 were substantially as follows. After reciting in the preamble the petition for legislative sanction for the reduction of capital, the power to issue debentures, and the validation of the agreement which had been filed with the registrar of joint stock companies at Victoria, the surrender of shares provided for in the agreement and the reduction of capital to 2,000,000 dollars were authorized. The company was then empowered, subject to obtaining the sanction of a resolution of 75 per cent. of the shareholders present, personally or by proxy, to issue debentures and execute a trust deed as provided by the agreement. The agreement itself and all its terms were then "validated, ratified, and confirmed, subject to the same being adopted by a resolution passed by 75 per cent. of the shareholders of the company present, personally or by proxy, at any meeting of the shareholders of the said company called for that purpose, and for the purpose of authorizing the issue of the said debentures, after February 14, 1911, and upon a copy of the said resolutions being filed with the registrar of joint stock companies at Victoria."

The first question which arises upon these, the words on the construction of which the appeal, in their Lordships' opinion, turns, is whether they make the adoption of this agreement by resolutions passed by the specified majority at a meeting called for the purpose, a condition without the fulfilment of which the agreement would remain ultra vires and therefore incapable of being made the act of

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the corporation, even if every shareholder joined in attempting to make it so. In their Lordships' opinion this question must be answered in the affirmative. It was argued for the respondents that the procedure directed by the Act was only one of internal management, which had been put within the power of the corporation, and which the members of the corporation could therefore effectively unite, in terms or by implication from subsequent action, to treat as in reality performed, notwithstanding the absence of formalities which were necessary only if a minority was sought to be bound by the decision of a majority. It was said that four years had elapsed since the agreement was made and carried out, and that the conduct of the shareholders had shown general and complete acquiescence. The Court of Appeal proceeded on this view of the law. In their Lordships' opinion it is fallacious. No doubt where some act, such as the granting of an obligation in the course of its business, is put by the constitution of a company within its power, and certain formalities of administration are prescribed by the articles of association which for domestic purposes regulate the duties of the directors to the shareholders, the mere failure to comply with a formality, such as a proper appointment or the presence of a quorum of directors, will not affect a person dealing with the company from outside and without knowledge of the irregularity. He is presumed to know the constitution of the company, but not what may or may not have taken place within doors that are closed to him. Lord Hatherley's judgment in *Mahony v. East Holyford Mining Co.* (1) is for practitioners in company law the classical exposition of this principle. But the case stands quite otherwise when the act is one which has not, by the constitution of the corporation, been put within its power excepting on the fulfilment of a condition. In that event the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled. The question which alternative applies is of course one of construction of the statute authorizing the act. Their Lordships are compelled to dissent from the view taken by the judges of the Court of Appeal on this point, and to hold, with Clement J., who tried the action, that unless the condition prescribed by the words cited from the private Act was literally and in reality fulfilled the agreement

(1) (1875) L. R. 7 H. L. 869.

remained, what it undoubtedly was apart from the Act, *ultra vires* of the appellant company.

The question that follows is whether, on the footing of this interpretation, the condition imposed was complied with. To answer this question it is necessary to consider the purpose for which the meeting was directed to be called, the terms of the notice by which this was done, and the circumstances in which the meeting took place.

The trust deed to secure the debentures was executed on the day the Act passed and was duly registered. It recites that all necessary resolutions of the directors and shareholders had been passed at meetings called to consider them. The shareholders' meeting took place at 3.30 on March 1, just half an hour after the Act had passed. A shareholder who has to receive notice of a general meeting is entitled, under art. 55 of the company's articles of association, to have sent to him a seven days' notice, stating, in the case of special business such as this, the general nature of the business. The notice actually sent was despatched on February 20, before the Act had passed. Having regard to the language of the private Act, their Lordships think that this anticipation of the passing of the statute was competent to the directors, but what remains to be seen is whether the notice gave the necessary information of the purpose of the meeting, and of the general nature of the special business for which it was called. The notice was to the effect that resolutions would be proposed that the company should ratify and adopt the agreement of February 11, and empower the directors to do all things that the Act authorized; that the debentures should be issued and the trust deed be executed; and that the capital should be reduced by cancellation of shares. Now the agreement had not been seen by the shareholders generally before the meeting. It is stated to have been filed with the registrar of joint stock companies at Victoria. Doubtless it could have been inspected there by shareholders who had hurried from Eastern Canada or the United States. But why should they think that it contained the serious matters it did contain? The resolutions of which notice was given to them merely said that an agreement dated February 11 had been entered into and filed with the registrar. The statement did not inform the shareholders that the debentures proposed to be issued

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were to be issued to shareholders, some of whom were directors, in exchange for their shares, nor did they refer to the fact, set out in the agreement itself, that Hodgson had brought an action against the directors and the company which was being compromised, and that the agreement contained a release by the company of all claims in respect of promotion which it might have against the directors. If the shareholders were to release possible claims, they ought to have been told of the grave character which Hodgson had attributed to the circumstances out of which he had alleged that they had arisen. Nor was there anything to tell them that as the result of the settlement Arbuthnot in particular would, under the terms of the agreement, cease to be a director and shareholder and would quit the company with large profits in his pocket. The absence of full notice was particularly inappropriate in the case of those shareholders who had given proxies at dates prior to the agreement, when they could have known nothing of what it was to contain—proxies which were not the less on that account used by the directors at the meeting.

Their Lordships are of opinion that to render the notice a compliance with the Act under which it was given it ought to have told the shareholders, including those who gave proxies, more than it did. It ought to have put them in a position in which each of them could have judged for himself whether he would consent, not only to buying out the shares of directors, but to releasing possible claims against them. Now this is just what it did not do, and therefore, quite apart from the fact that the meeting was held in half an hour from the time the Act passed and before the shareholders could have had a proper opportunity of learning the particulars of what the Legislature had authorized, their Lordships are of opinion that the notice was bad, and that what was done was consequently ultra vires.

This disposes of the controversy. The judgment of the Court of Appeal must be reversed, excepting so far as it dismisses the claim for profits made by promotion, a claim which was given up at the Bar on this appeal. The judgment of Clement J. will be restored so far as relates to the first part of its declarations, except that the name of Reynolds will be omitted from the second and third of them, and that the words “pay to the plaintiff company the amount thereof or ” will be struck out of the third. The fifth, sixth, seventh,

and eighth declarations, which relate to profits made by promotion, disappear. Declarations 9 to 14 inclusive will be restored, as well as the reservation of further consideration. (1)

Their Lordships do not intend by their judgment to prejudice rights competent to any one whose rights do not purport to be dealt with by their decision.

As to the costs, their Lordships think that the appellant company should have the general costs of the action up to and including the trial, excepting that they must pay to the respondents the costs of the issues on which the latter succeeded at the trial. In the Court of Appeal neither party should have any costs. The appellant company will have the general costs of the appeal to the King in Council, less half the costs of printing and perusing the record. There will be liberty to apply to the Court of first instance to give effect to this judgment.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Surtees, Phillpotts & Co.*

Solicitors for respondents : *Linklater & Co.*

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(1) NOTE.—The judgment of Clement J. declared (1.) that the agreement of February 11, 1911, was never adopted by or binding upon the appellant company, and that all proceedings taken to give it effect were illegal, void and ultra vires of the appellant company, and that the debenture issue, the trust deed, the cancellation of shares, and reduction of capital were illegal, void and ultra vires of the appellant company ; (2.) that the debentures held by the respondents should be delivered up to be cancelled, and that the respondents should respectively repay to the appellant company all moneys received by them in respect of such debentures and that the respondent, British American Trust Company, Limited, should repay to the appellant company all the trustee's and inspector's fees received by it ; (3.) that in the event of the respondents failing to deliver up the said debentures received by them that the directors of the company at the time of the entering into of the agreement of February 11, 1911, should "pay to the plaintiff company the amount thereof, or" indemnify the appellant company against the same ; (4.) that the shares were improperly surrendered and cancelled and should be reissued. Declarations 5 to 8, inclusive, related to promotion profits ; the further declarations restrained the respondents from dealing with the trust deed, or the debentures held by them, otherwise than by delivery to the appellants for cancellation, provided remedies in default of compliance with the declarations, and dealt with the costs of action.

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[PRIVY COUNCIL.]

THE SUDMARK.

ON APPEAL FROM THE PRIZE COURT, EGYPT.

Prize Court—Jurisdiction—Suez Canal—Prize staying over Twenty-four Hours—Suez Canal Convention, 1888, arts. IV., VI.

The Suez Canal Convention, 1888, to which Great Britain, Germany, and other Powers were parties, provided, by arts. IV. and VI., that the stay of prizes of war at Port Said or in the roadstead of Suez should not exceed a period of twenty-four hours, except in case of distress. By art. IX. the Egyptian Government, which at the material time was controlled by the British Government, was to take the necessary measures for the execution of the Convention.

On August 15, 1914, a British cruiser captured a German steamship in the Red Sea and escorted her to Suez. The prize stayed in the roadstead of Suez for a period of thirty-two hours, a prize crew was then put on board, and she was taken to Alexandria, where she was condemned by the Prize Court:—

Held, assuming that there had been a breach of the Convention, that fact was not cognizable by the Prize Court as a ground for the release of the prize.

APPEAL from a judgment of His Majesty's Supreme Court for Egypt, sitting at Alexandria in Prize (February 5, 1915).

The facts are stated in the judgment of their Lordships.

1917. July 19. *Sir Erle Richards, K.C.*, and *C. R. Dunlop*, for the appellants, the Hamburg-Amerika Line. Having regard to arts. IV. and VI. of the Suez Canal Convention, 1888, the *Sudmark* should be released. Each Power which was a party to the Convention is bound by its terms, and in relation to a prize brought into the canal or its approaches is in the same position as a neutral Government into whose port a prize is brought. If the obligation to enforce the Convention was placed only upon the Egyptian Government, then the British Government, being in occupation, was bound thereby. By international law a prize brought into a neutral port and remaining there for longer than the prescribed period should

* *Present*: LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR SAMUEL EVANS, and SIR ARTHUR CHANNELL.

be restored to the owner by the Courts of the neutral : Wheaton's International Law (Dana's edition, 1866), p. 486, n. ; Hall's International Law, 6th ed., 1909, p. 614 ; Rivier's Principles of the Law of Nations, 1896, vol. 2, p. 404 ; notes to *The Tuscaloosa*, Pitt-Cobbett, 1913, pt. 2, p. 358 ; Hague Convention, No. 13, arts. 21 to 23. The principle was recently applied by the Supreme Court of the United States in *The Steamship Appam* (1), and it applies by analogy in this case. The stay at Suez was a breach of the Convention, and the Prize Court should give effect to the treaty obligation.

Sir Frederick Smith, A.-G., and *Geldart*, for the respondent, His Majesty's Procurator in Egypt, were not called upon.

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LORD PARKER OF WADDINGTON. A German vessel, being on a voyage from Colombo to Antwerp via the Suez Canal, was on August 15, 1914, stopped by H.M.S. *Black Prince* in the Red Sea and ordered to proceed to Suez. It is not disputed that this amounted to a seizure as prize. The vessel arrived in the roadstead at Suez at 1 A.M. on August 17, and at 9 A.M. on the 18th left for Alexandria in charge of a prize crew. She arrived at Alexandria on August 20. The writ in the present proceedings was issued on October 23, 1914, on behalf of His Majesty's Procurator in Egypt asking for condemnation of the vessel as lawful prize.

It was not disputed before their Lordships' Board that the seizure of the vessel on August 15 in the Red Sea was a lawful seizure as prize, such as in ordinary course would justify an order for condemnation. The appellant, however, relied on what happened after the seizure, coupled with the provisions of the Suez Canal Convention, 1888, as entitling the vessel to be released.

The first article of the Suez Canal Convention, 1888, provides that the Suez Maritime Canal shall be free and open in time of war as in time of peace to every vessel of commerce or of war without distinction of flag. The fourth article provides that vessels of war of belligerents shall not revictual or take in stores in the canal, or its ports of access, except in so far as may be strictly necessary, and that their stay at Port Said or in the roadstead at Suez shall not exceed

(1) (1917) 243 U. S. 124.

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twenty-four hours except in case of distress. The sixth article provides that prizes shall be subjected in all respects to the same rules as the vessels of war of belligerents. It is said that the *Sudmark* stayed in the roadstead at Suez for more than twenty-four hours, and thereby committed a breach of these provisions in consequence of which she ought to be released.

That the vessel did remain in the roadstead at Suez for more than twenty-four hours is certain; but their Lordships entertain some doubt whether in so doing she committed a breach of the Convention. The captain, in his affidavit of October 18, 1914, says that on reaching Suez he went to the British consulate and requested leave to take in provisions and water, which leave was given. He also says that he was ordered by the captain of H.M.S. *Chatham*, then at Suez, to leave for Alexandria the next morning, but refused unless he were allowed to proceed with his own officers and crew. It is at least arguable that under these circumstances there was such a case of necessity or distress as would render the twenty-four hours' rule inapplicable. Their Lordships will, however, assume that the rule was broken, and will proceed to consider the consequences of such breach.

The Convention, which is an international agreement, imposes on the contracting Powers a number of obligations which, except in the case of the Egyptian Government and the Imperial Ottoman Government, are purely negative. On the Egyptian Government and the Imperial Ottoman Government alone is any positive obligation imposed. By art. IX. the Egyptian Government is within the limits of its powers resulting from the firmans to take the necessary measures for insuring the execution of the Convention, and, in case it has not the necessary means at its disposal, is to call on the Imperial Ottoman Government, and the latter Government is then to take the necessary measures, giving notice thereof to and concerting with the Powers therein referred to. But for the fact that the Egyptian Government was de facto controlled by the Government responsible for the breach in question, the fact that neither the Egyptian Government nor the Imperial Ottoman Government intervened would have been sufficient proof that the breach (if any) was purely technical, and did not call for any action on their part.

But even if this inference does not under the circumstances arise,

the question remains as to whether a Court of Prize can properly constitute itself the guardian of the Convention and invent and exact penalties for its non-observance, although no such penalties are imposed by the Convention itself. In their Lordships' opinion this question can only be answered in the negative. The jurisdiction of a Court of Prize does not embrace the whole region covered by international law. It is confined to taking cognizance of and adjudicating upon certain matters (including capture at sea), which in former times were enumerated in the Royal Commissions under which the Court was constituted and are now defined both by statute and by the Royal Commission issued at the beginning of the war (see Naval Prize Act, 1864, s. 55, sub-s. 5; Judicature Act, 1891, s. 4, sub-s. 1; and Royal Commission of August 6, 1914). It is true that the Court must adjudicate on these matters in accordance with international law, including international agreements. But the international law which the Court is to enforce is that branch of international law (including international agreements) which relates to matters of which the Court is to take cognizance and upon which it is to adjudicate. It has no such roving jurisdiction as suggested by the appellant's counsel.

Considerable stress was laid in argument upon the recent decision of the Supreme Court of the United States in the case of *The Steamship Appam*. (1) In their Lordships' opinion that decision has no application to the present case. According to the rules of international law, a prize may under certain circumstances be taken into a neutral port, but its right to remain there is limited by the continued existence of these circumstances. When these circumstances cease to exist it is the duty of the neutral to order it to leave forthwith, and if it fail to leave to cause its release.

If the neutral allow the prize to remain longer than is warranted by the circumstances it is no doubt guilty of an unneutral act, which may well be made the subject of diplomatic complaint. But their Lordships cannot think that the captor's Prize Court has any jurisdiction to entertain the question, or is bound, if it consider that there has been an unneutral act, to release the prize on that account.

Assuming that in the present case the Egyptian Government or the Imperial Ottoman Government may be looked upon as a neutral

(1) 243 U. S. 124.

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Power which has allowed a prize to remain in one of its ports longer than is warranted by international law or international agreement, their Lordships cannot hold that the Prize Court has on that account any power or duty to release the prize.

Their Lordships will therefore humbly advise His Majesty that the appeal fails, and should be dismissed with costs.

Solicitors for appellants : *Stokes & Stokes.*

Solicitor for respondent : *The Treasury Solicitor.*

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COMMISSIONERS OF STAMPS APPELLANTS ;
AND
QUEENSLAND MEAT EXPORT COMPANY, }
LIMITED } RESPONDENTS.
[AND CONSOLIDATED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Queensland—Stamp Duty—Agreement to transfer—Conveyance or Transfer on Sale —Equitable Interest—Stamp Act, 1894 (58 Vict., No. 8, Queensland), s. 49 ; s. 54, sub-s. 1.

The Stamp Act, 1894, of Queensland imposes an ad valorem stamp duty upon “a conveyance or transfer on sale of any property.” By s. 49, “‘conveyance on sale’ includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to, or vested in, a purchaser.” By s. 54, sub-s. 1, “any contract or agreement . . . for the sale of any equitable estate or interest in any property shall be charged with the same ad valorem duty . . . as if it were an actual conveyance on sale of the estate, interest, or property”

Upon the reconstruction of a company it agreed with a new company, in consideration of the allotment of shares, that it should transfer to the new company sundry lands, shares, live stock, plant, book debts, and the benefits of all pending contracts and consignments of goods and of all trade marks. The agreement did not appropriate the consideration to the various classes of assets, nor provide when they respectively should be transferred.

* *Present* : VISCOUNT HALDANE, LORD DUNEDIN, and LORD SUMNER.

Transfers were made and ad valorem duty, apportioned under s. 53, was paid in respect of the lands, shares, goodwill, and trade marks. The appellants claimed ad valorem duty upon the further assets referred to in the agreement, namely, the live stock and other chattels and the book debts and other choses in action :—

Held, that the agreement was not chargeable with ad valorem duty as it did not effect an immediate transfer of the assets, nor was it one for the sale of an equitable interest.

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APPEAL from a judgment of the Supreme Court of Queensland (December 15, 1916) upon a case stated under s. 24 of the Stamp Act, 1894, of Queensland.

The question raised by the case stated and upon the appeal was whether an instrument, namely, an agreement dated November 18, 1915, was chargeable under the above-mentioned statute with ad valorem stamp duty, or with a stamp duty of 10s. only as a deed or agreement under seal.

The facts and the relevant statutory enactments appear from the judgment of their Lordships.

The Supreme Court, by a judgment reported at 1917 St. R. Qd. 39, held that the instrument was chargeable with a duty of 10s. only.

1917. July 6, 10. *Sir John Simon, K.C., and Austen-Cartmell*, for the appellants. The instrument of November 18, 1915, is a "conveyance or transfer on sale," within s. 49 of the Stamp Act, 1894, of all the items comprised in it, except those which were subsequently transferred. The items, with those exceptions, were thereby in law transferred to, or vested in, the respondents. With regard to the stock and other goods there was an unconditional sale of specific goods in a deliverable state, and under s. 21, sub-s. 1, of the Queensland Sale of Goods Act, 1896, the property passed when the contract was made. The Supreme Court, upon the authority of *Lanyon v. Toogood* (1), considered that the intention was that the property should not pass until the land was transferred. That case is distinguishable, as the sale of the furniture was in terms conditional upon a good title being made to the house. In any case, the instrument was a transfer of the choses in action; if it was not, there was nothing by which they have been transferred. If, however, the instrument did not transfer the legal ownership in the

(1) (1844) 13 M. & W. 27.

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chattels and choses in action, it was a transfer of the equitable interest in them, and was chargeable ad valorem under s. 54, sub-s. 1. That sub-section was intended to apply to an executory transfer. The Supreme Court relied upon *Inland Revenue Commissioners v. G. Angus & Co.* (1); that case, however, was decided under s. 70 of the (English) Stamp Act, 1870, upon the words "legally and equitably transferred." The Queensland Act is based upon the Stamp Act, 1891, which altered the language of the Act of 1870, presumably on account of that decision.

Hon. F. Russell, K.C., and *P. S. Stokes*, for the respondents, were not called upon.

Aug. 3. The judgment of their Lordships was delivered by

LORD SUMNER. After carrying on the business of meat preservers and graziers for a number of years, the Queensland Meat Export and Agency Company, Limited, decided in 1915 to separate its two concerns. The plan adopted was to wind up the old company, the Queensland Meat Export and Agency Company, and to incorporate two new companies, called respectively the Queensland Meat Export Company, Limited, and the Australian Stock-Breeders' Company, Limited, and then the liquidator of the old company was, by contract with each of the new companies, to engage to transfer to them their respective shares of the assets for considerations, consisting principally of shares in the new companies. These shares he was then to distribute among the shareholders in the old company. This scheme was carried out.

In due course the question of stamp duties arose. The agreement between the old company and the Queensland Meat Export Company, Limited, which was dated November 18, 1915, provided that the former "shall transfer" and the latter "shall take over" sundry lands and buildings, shares in joint-stock companies, live stock, plant and stores, book and other debts, and the benefits of all pending contracts, of all outstanding consignments of meat and of all trade marks, and finally all other property of the old company, for a consideration, consisting, inter alia, of the allotment to the liquidator of the old company of 654,969 of the new company's fully-paid shares. No appropriation was made between these considerations

on the one hand and the different classes of assets on the other, nor did the contract express how or when the transfers of each class of assets were to be effected. In time the real property was conveyed and the shares in the joint-stock companies and the goodwill and trade marks were transferred, and thereupon stamp duty ad valorem was duly paid, pursuant to the Stamp Act, 1894 (Queensland Statutes, 58 Vict. No. 8), s. 53, sub-s. 1, which provides that "where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned."

The Commissioners of Stamps, however, further contended that stamp duty ad valorem was payable in respect of the live stock, stores, plant, and products on hand (all being chattels in the transferors' possession), and also in respect of the choses in action, namely, book debts and outstanding consignments, or, in other words, uncompleted transactions for the sale of meat consigned abroad, for if the purchasers became entitled to all these things, in praesenti, by virtue of the execution of the agreement, duties became payable by them ad valorem as upon conveyances or transfers, and not merely, as the purchasers maintained, the 10s. duty appropriate to a deed.

The meaning of the expression "conveyance or transfer" is given by s. 49: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser." It is further provided by s. 54, sub-s. 1, that "Any contract or agreement . . . under hand and seal, or under seal only, or under hand only, for the sale of any equitable estate or interest in any property whatsoever, shall be charged with the same ad valorem duty to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

The question, therefore, is whether the instrument of November 18, 1915, is one "whereby any property is transferred to or vested in a purchaser," and whether it is "a contract for the sale of an equitable interest in any property." The answer depends upon the intention of the parties to be collected from the terms of the instrument under the circumstances of its execution.

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It is plain that the instrument is not a contract for the sale of an equitable interest. All the subject-matters dealt with are meant to be sold out and out. The doubt is whether that sale is, as to any of them, a sale in praesenti. Furthermore, it is plain that, as regards the real property at any rate, no estate or interest therein was vested in the purchasers or was intended to be vested in them on the execution of the deed. The agreement gave them a right to equitable relief in case the old company failed to convey, but in respect of the hereditaments it was a contract to sell only. Next it is urged that, by the terms of the Sale of Goods Act of 1896 (Queensland Statutes, 60 Vict. No. 6), s. 21, "where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made," and that the chattels at any rate passed under the contract to the buyer on its execution; but this is only "unless a different intention appears," and the question is whether that different intention, which clearly appears in regard to the hereditaments, does not also appear in regard to the chattels and the choses in action. The language employed and the scheme both of the consideration and of the drafting is clearly the same for all. By the judgments of the Supreme Court of Queensland, against which these appeals are brought, it was decided that such a contrary intention did appear. In these conclusions their Lordships concur.

The distinction between an agreement to sell and a sale, between an agreement to convey and a conveyance, is fundamental and familiar. It is also a familiar transaction to include in one agreement a bargain relating to hereditaments, choses in action, and chattels. Here all these subject-matters formed parts of one going concern, and it was the chief object of the transaction that the new company should continue the going concern, which the old company had carried on. The contract was entire. The considerations are not severed or appropriated. Their Lordships infer that the intention was to vest the different subject-matters, by the appropriate forms and assurances according to their nature, when, but not until, they could all be transferred together and the entire considerations could be exchanged against the collective transfers. So the contract is framed, but the inference does not depend simply on the frame of the contract. The consideration could not be severed or

apportioned without some further agreement, which neither party could be required to make. Any other construction would impute to the one side or the other an intention to divest itself of something belonging to it, as an act of confidence and upon credit. It may well be that entire mutual confidence existed, but there is no discoverable convenience or business object in vesting the properties *seriatim*. There is, moreover, a clear advantage in so framing the transaction as to prevent the property in the chattels passing or the title in the choses in action accruing on the bare execution of the deed. The Queensland Stamp Act, 1894, s. 54, unlike the English Stamp Act of 1891, s. 59, sub-s. 1, contains no provision to the effect that a contract for the sale of chattels other than goods, wares, or merchandise shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale. It is not unreasonable to suppose that the parties were advised of this peculiarity, and intended, as they legitimately might, to take advantage of it to the direct benefit of one of them, and probably to the indirect benefit of the other.

It was admitted that in this view of the construction no other point arose in the case of the Australian Stock-Breeders' Company, Limited. Their Lordships will accordingly humbly advise His Majesty that the appeals in both cases should be dismissed with costs.

Solicitors for appellants : *Freshfields*.

Solicitors for respondents : *Parker, Garrett & Co.*

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TORONTO RAILWAY COMPANY APPELLANTS ;

AND

THE KING RESPONDENT.

ATTORNEY-GENERAL FOR ENGLAND AND }
 ATTORNEY-GENERAL FOR CANADA } INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
 APPELLATE DIVISION.

*Canada (Criminal Law)—Common Nuisance—Indictment—Demurrer—
 Overcrowding Street Railway—Endangering Public Property and
 Comfort—Contractual Duty—"Criminal case"—Right of Appeal to
 Privy Council—Criminal Code (R. S. Can., 1906, c. 146), ss. 221,
 222, 223, 1025.*

The Criminal Code (R. S. Can., c. 146) enacted by s. 10 that the criminal law of England, as it existed on September 17, 1792, except so far as modified by the Code or by other statutes, should be the criminal law for the province of Ontario. The Code further provided as follows :—

Sect. 221 : "A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects."

Sect. 222 : "Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual."

Sect. 223 : "Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the last preceding section shall not be deemed to have committed a criminal offence ; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

Sect. 1025 : "Notwithstanding any Royal prerogative, or any thing contained in the Interpretation Act or in the Supreme Court

* *Present* : VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard."

The appellants operated a street railway in Toronto under an agreement with the city corporation, confirmed by statute. The agreement provided that the cars were not to be overcrowded. They were convicted upon indictment in Ontario, under a count charging them with having failed, in breach of a legal duty, to take reasonable precautions to avoid undue, illegal, and dangerous overcrowding in their cars, whereby the property and comfort of the public, passengers in the cars, were endangered. The appellants demurred to the count, but upon a case stated the conviction was upheld; they then appealed to His Majesty in Council:—

Held: (1.) that, having regard to s. 223 of the Code, the matter was not a "criminal case" within the meaning of s. 1025, and that consequently it was not necessary to decide whether that section effectually abrogated the prerogative right of appeal in the cases to which it referred; (2.) that the demurrer should be allowed, since the overcrowding alleged did not affect the public as such, but only those members of the public who had obtained licences from the appellants to use the cars.

APPEAL by special leave from a judgment of the Supreme Court of Ontario, Appellate Division (November 9, 1915), upon a case stated by Riddell J.

The appellants were incorporated by an Ontario statute, 55 Vict. c. 99, which confirmed an agreement between the appellants and the corporation of Toronto, dated September 1, 1891, providing for the operation by the appellants of a street railway in Toronto. By clause 38 of the conditions and tender, forming part of the agreement, it was provided "cars are not to be overcrowded (a comfortable number of passengers for each car to be determined by the city engineer, and approved by the city council)." There had been considerable litigation between the appellants and the corporation with regard to alleged overcrowding and the means of avoiding it, but the number of passengers to be carried had not been determined in the way provided by clause 38.

In December, 1910, an indictment containing several counts relating to alleged overcrowding of their cars was preferred against the appellants in the county of York, Ontario. The sections of the Criminal Code under which the indictment was laid, namely, ss. 221, 222, 223, are set out in the head-note. The appellants

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demurred to the indictment, but the demurrer was overruled, the appellants being allowed to plead over.

The trial took place before Riddell J. and a jury in January, 1911. The jury found the appellants guilty upon a count of the indictment which, after alleging that the appellants were under a legal duty to carry the passengers received by them in such a manner as to avoid endangering the property and comfort of the said passengers, alleged that the appellants unlawfully neglected to take any reasonable precautions or care to prevent undue, dangerous, and illegal overcrowding of passengers in their cars, in consequence whereof the property and comfort of the public, passengers in the said cars, were endangered. Upon other counts, including one charging that the alleged overcrowding endangered the lives, safety, and health of the public, the jury disagreed and were discharged.

At the request of the appellants the learned judge after verdict stated a case under s. 1014, sub-s. 2, of the Code for the opinion of the Appellate Division, one of the questions raised thereby being whether the learned judge should have allowed the demurrer to the indictment, or any part of it.

The Appellate Division, by a judgment delivered on November 9, 1915, by Meredith C.J.O., the other members of the Court concurring, held (so far as is material to the present appeal) that the count upon which the appellants were convicted charged a criminal offence and the commission of a common nuisance, and that the demurrer to it was properly overruled. The proceedings are reported at 34 Ont. L. R. 589.

The Judicial Committee granted special leave to appeal, liberty being reserved to the respondent to contend that special leave ought not to have been granted.

The appeal originally came on for hearing on December 16, 1916, when, upon a preliminary objection being taken that it was not competent having regard to s. 1025 of the Criminal Code, their Lordships ordered that notice should be given to the Attorney-General for England and the Attorney-General for Canada, and that the further hearing should stand adjourned.

1917. July 16, 17. Upon the appeal again coming on for argument their Lordships, after some discussion, directed that the

question whether the matter was a "criminal case" within the meaning of s. 1025 of the Criminal Code should first be argued.

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Clauson, K.C., Dymond, K.C. (Attorney-General for Ontario), and *Micklethwait*, for the respondent; *P. O. Lawrence, K.C.*, and *T. Mathew*, for the Attorney-General for the Dominion of Canada, interveners. This is a "criminal case" within the meaning of s. 1025 of the Code. Sect. 223 shows that the matter charged in the count was an indictable offence. The effect of that section is merely that the matter is not to be deemed a criminal offence for purposes outside the Code. For instance, a seat upon a municipal council would not be vacated under s. 152 of the Municipal Act (R. S. Ont., 1914, c. 192) upon a conviction and imprisonment. The words "criminal case" are used elsewhere in the Code, for instance in ss. 599, 602, 1013, and 1014, and cover any offence indictable under the Code. Under s. 1052, which refers to indictable offences for which no punishment is specially provided, five years' imprisonment could be imposed for the offence. If this is not a criminal offence there was no right of appeal under s. 1013, nor a right to have a case stated under s. 1014. The effect in England of a conviction for non-repair of a highway is governed by statute and does not affect the present question. An order for abatement made upon an indictment for non-repair cannot, however, be treated as a civil matter: *Reg. v. Bateman* (1); so too an order to abate a statutory nuisance is a "criminal cause or matter": *Reg. v. Whitchurch*. (2) The Costs in Criminal Cases Act, 1908, by s. 9, sub-s. 3, recognizes that an indictment for non-repair is a criminal case. The legislative authority of the Dominion Parliament to deal with the matter is derived solely from s. 91, head 27, of the British North America Act, 1867, which refers to "criminal law and procedure"; if this is not a criminal case, there was no authority in that Parliament to deal with the matter. [Reference was also made to the Interpretation Act (R. S. Can., 1906, c. 1), ss. 16 and 28.]

Sir John Simon, K.C., D. L. McCarthy, K.C., and *Givven*, for the appellants. This is not a "criminal case." Sect. 221 merely defines a common nuisance. The charge in the count is expressly excluded by s. 223 from being a criminal offence. That which is not

(1) (1857) 8 E. & B. 584.

(2) (1881) 7 Q. B. D. 534.

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a criminal offence cannot be a "criminal case" within the Code. The effect of s. 223 as to common nuisances not within s. 222 is merely to preserve indictment as a method of procedure. In England indictment or information as a method of procedure to enforce a civil right is recognized by the Evidence Act, 1877 (40 & 41 Vict. c. 14), s. 1. That which is an offence is not necessarily a crime: *Attorney-General v. Bradlaugh*. (1) Sect. 223 excludes the imposition of a penalty. Sect. 1052 does not apply; it cannot have been intended that nuisances not within s. 222 should be punished more severely than those within that section. Further, this is not a "criminal case," because the indictment discloses no indictable offence—first, in that the facts alleged do not constitute a common nuisance; secondly, in that the Code provides no remedy, either by punishment or abatement, applicable to the facts alleged (see subsequent argument on these contentions).

Clauson, K.C., replied.

Sir Frederick Smith, A.-G., *Sir Gordon Hewart, S.-G.*, and *Branson*, for the Attorney-General for England, intervener.

Their LORDSHIPS held, for reasons to be given subsequently, that the matter was not a "criminal case" within the meaning of s. 1025 of the Criminal Code, and that the preliminary objection accordingly failed.

Sir John Simon, K.C., *D. L. McCarthy, K.C.*, and *Gieveen*, for the appellants. The matter charged in the count was not a common, or public, nuisance. To constitute that offence at common law the act or omission charged must be *ad commune nocumentum*: *Hawkins, Pleas of the Crown*, book 1, c. 75; *Russell on Crimes*, 7th ed., vol. 2, p. 1833. That principle is preserved by the terms of s. 221. A breach of duty towards a part of the public is not sufficient to constitute a public nuisance: *Rex v. Richards* (2); see also *Woodman v. Robinson*. (3) In this case the public generally were not affected, but only such of the public as were passengers. If the appellants owed any duty to the passengers to prevent overcrowding it was a duty arising out of the contract of carriage, and not a duty towards the public generally: *Pounder v. North Eastern*

(1) (1885) 14 Q. B. D. 667, 689.

(2) (1800) 8 T. R. 634.

(3) (1852) 2 Sim. (N.S.) 204.

Ry. Co. (1); *Metropolitan Ry. Co. v. Jackson*. (2) The appellants were not in the position of common carriers as regards the passengers: *Readhead v. Midland Ry. Co.* (3); they were not obliged to carry any member of the public. Further, the Code imposes no fine or penalty for the matter charged, and proceedings by writ of abatement in this case were inapplicable, since the nuisance charged was not of a continuing character: *Rex v. Pappineau* (4); Russell on Crimes, 7th ed., vol. 2, p. 1839; there was no means by which the sheriff could abate the alleged nuisance: *Bagshaw v. Buxton Local Board of Health*. (5) Consequently there was no remedy under the Code for the matters alleged, and for this further reason the count was bad.

Clauson, K.C., Dymond, K.C., and Micklethwait, for the respondent. The count alleged an offence indictable both at common law and under the Criminal Code. The appellants were by statute under a legal duty not to overcrowd their cars. It is not material that that duty originally rested upon contract with the corporation; it was a duty imposed upon them in the interest of the public and as a condition to the user of the public streets sanctioned by the statute. The fact that only those who paid a fare had the right to travel makes no difference. The inhabitants of a parish could be indicted for not repairing a highway although it was a turnpike, so that only those who paid the toll suffered inconvenience: *Reg. v. Lordsmere (Inhabitants)* (6); see also the Turnpike Act, 1822 (3 Geo. 4, c. 126). In *Reg. v. Price* (7) Stephen J. charged a grand jury that annoyance to "a considerable number of persons" was sufficient to constitute a common nuisance. Each of the appellants' cars was a public place to which the public had access upon payment of the fare; a passenger by paying the fare did not cease to be a member of the public. The position is the same as that in *Reg. v. Saunders* (8), in which the indictment was upheld.

Aug. 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal, for which special leave was given, from a judgment of the Court of Appeal for Ontario.

(1) [1892] 1 Q. B. 385.

(2) (1877) 3 App. Cas. 193.

(3) (1869) L. R. 4 Q. B. 379.

(4) (1727) 2 Str. 686.

(5) (1875) 1 Ch. D. 220, 224.

(6) (1850) 15 Q. B. 689.

(7) (1883) 12 Q. B. D. 247, 256.

(8) (1875) 1 Q. B. D. 15.

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The question is whether the appellants were properly found guilty on an indictment for having failed, in breach of an alleged legal duty, to take reasonable precautions to avoid undue dangerous and illegal overcrowding of passengers in their tramway cars, whereby the property and comfort of the public, as passengers in these cars, were endangered. The cars were run by electricity on tracks laid along certain streets of the city of Toronto.

The indictment was brought under the Criminal Code enacted by the Dominion Parliament, which forms c. 146 of the Revised Statutes of Canada, 1906. The Code enacts (s. 10) that the criminal law of England, existing at a certain date, is to be the criminal law of the province of Ontario, except so far as modified by the Code itself or other statutes. It subsequently (s. 221) defines a common nuisance to be an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects. Having thus defined a common nuisance, the Code goes on to divide such nuisances into two categories with different consequences attached. By s. 222 every one is to be guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual. By s. 223, on the other hand, any one convicted upon any indictment or information for any common nuisance other than those mentioned in the last section "shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right." The effect of this section is, in their Lordships' opinion, to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public, or by obstruction of any right, other than one affecting life, safety, or health, which is common to all His Majesty's subjects, has been committed. But it does deprive a conviction on indictment, in these cases, of its criminal character. The method of indictment is at times used in English law as a convenient one for trying a civil right, and the section of the Canadian statute appears to give

recognition to this use of the method, and to deprive it of any result in criminal consequences.

There are other sections of the Code which must be referred to. Sect. 1013 enacts that an appeal from the verdict or judgment of a Court or judge having jurisdiction in criminal cases on the trial of any person for an indictable offence shall lie, upon the application of such person, if convicted, to the Court of Appeal in the cases thereafter provided for, and in no others. When the judges of the Court of Appeal are unanimous their decision is to be final ; but if any judge dissents an appeal will lie to the Supreme Court of Canada. No proceeding in error is to be taken. A case may be stated on a question of law during the trial. Sect. 1025 enacts that, notwithstanding any Royal prerogative, or anything contained in the Supreme Court Act, or in the Interpretation Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard. A copy of the Act containing this section having been transmitted by the Governor-General of Canada, who had assented to it, to the Principal Secretary of State for the Colonies, it was allowed by Her then Majesty Queen Victoria without comment.

The appellants are a street railway company, incorporated by a statute passed in 1892 by the Legislature of the province of Ontario. They operate their street railway under an agreement with the corporation of Toronto, which was confirmed by the statute referred to, and the conditions and tender incorporated in the agreement were declared to be valid and legal, and to be binding on the parties to it. Paragraph 38 of the conditions and tender provided that cars were not to be overcrowded (a comfortable number of passengers for each class of car to be determined by the city engineer and approved by the city council). It does not appear that the obligation thus imposed on the appellants was invested by the statute with anything further than the contractual character which it originally possessed.

The indictment brought against the appellants contained a number of counts, some of them for criminal common nuisances, based on s. 222 of the Code, which deals with danger to the life, safety, or health of the public. The only count, however, on which the jury

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found a verdict of guilty at the trial was the count already referred to, which was based on danger to the property and comfort of the public, under s. 223. The appellants demurred to the indictment, but, the demurrer being overruled, the appellants pleaded over. At the request of the appellants Riddell J., who presided at the trial, stated a case for the Appellate Court of Ontario, which raised, among other questions, the question whether the demurrer should have been allowed.

The Appellate Court found that the appellants were guilty, on the finding of the jury, of a criminal offence on the count referred to, that the demurrer was properly overruled, that there had been no misdirection, and that the conviction should be affirmed. The learned judges of the Court of Appeal thought that the Code intended to leave untouched the common law right to proceed by indictment for a public nuisance and merely to alter the punishment on a conviction for what remained a criminal offence. They said that just as in the case of a nuisance on a public highway the nuisance was a public one, although it was only those members of the public that had occasion to use the highway that were prejudicially affected, so all those members of the public for whom there was room in the cars had the right to travel in them.

The appellants applied to the Sovereign in Council for special leave to appeal, and this was granted subject to a reservation of liberty to the respondents to raise the question whether leave should have been granted, having regard to the fact that the matters in dispute formed the subject of a criminal charge. It was arranged that, as a question was raised whether s. 1025 of the Dominion statute had effectually abrogated the prerogative right to hear the appeal, the Attorney-General for England and the Attorney-General for Canada should be notified. They have both of them, as the result, been represented during the argument at the Bar.

It has in the event become unnecessary for their Lordships to express an opinion on the question as to the prerogative, for they have arrived at the conclusion that, on the true construction of the Code, this is not a criminal case within the meaning of s. 1025, which purports to limit the prerogative, but is in reality a question of civil right which may properly be made the subject of appeal to the Sovereign in Council, and as to which the prerogative is not affected.

The point turns on the construction of s. 223, and their Lordships think that, although the section preserves indictment and information as modes of procedure in the cases with which alone it deals, those relating to the property or comfort of the public, and to obstruction of rights common to the Kings' subjects other than those dealt with in s. 222, it divests the breach of duty so tried of any criminal character. The section provides that any one convicted under it is not to be deemed to have committed a criminal offence, and goes on to preserve the possibility of such consequential proceedings or judgments as may be taken or had under the existing law, not for the punishment of the person convicted, but for the abatement or remedy of the mischief done by the nuisance to the public right. The wrong done is therefore, in their Lordships' opinion, only a civil wrong. That indictment should be recognized in a statute as a method of trying a civil right is nothing new. For example, s. 1 of the English Evidence Act of 1877 (40 & 41 Vict. c. 14) provides that, on an indictment for the purpose of trying or enforcing a civil right only, the defendant and the wife or husband of the defendant are to be admissible witnesses. Their Lordships think that it was competent to the Parliament of Canada under s. 91, sub-s. 27, of the British North America Act, 1867, which enables it exclusively to legislate as to criminal law, including procedure in criminal matters, to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive.

These considerations dispose of the point as to the competency of this appeal. What remains is the question whether the demurrer should have been allowed. Their Lordships are of opinion that this should have been done. The obligation of the appellants was a contractual obligation to the corporation. There was no duty to the public generally. That the electric cars ran on rails along the streets made no difference in this respect. For these cars were on the street in derogation of the public right which the Legislature of Ontario and the corporation of Toronto had thought it advantageous to interfere with. The cars were not the less thereby the property of the appellants, which the public could only enter by invitation. Whatever conditions in the grant of the appellants' title the corporation had contracted for obtained merely between them and the

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appellants. The overcrowding was not a matter that affected the public as such, but only those members of the public who had obtained from the appellants licences to enter the cars.

This being, in their Lordships' opinion, the conclusion to which the Court of Appeal ought to have come, it follows that the demurrer should have been allowed and an acquittal directed. Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed and the judgment of the Appellate Division of the Supreme Court of Ontario dated November 9, 1915, set aside and the matter remitted to the Supreme Court so that a verdict of acquittal may be pronounced in favour of the appellants. The respondent should pay to the appellants their costs in the Appellate Division and of this appeal; those of the proceedings in the Court of first instance should be left to the discretion of that Court. The Attorney-General of England and the Attorney-General of Canada will neither receive nor pay costs.

Solicitors for appellants : *Charles Russell & Co.*

Solicitors for respondent : *Freshfields.*

Solicitor for the Attorney-General for England, intervener : *The Treasury Solicitor.*

Solicitors for the Attorney-General for the Dominion of Canada, intervener : *Kays & Jones.*





